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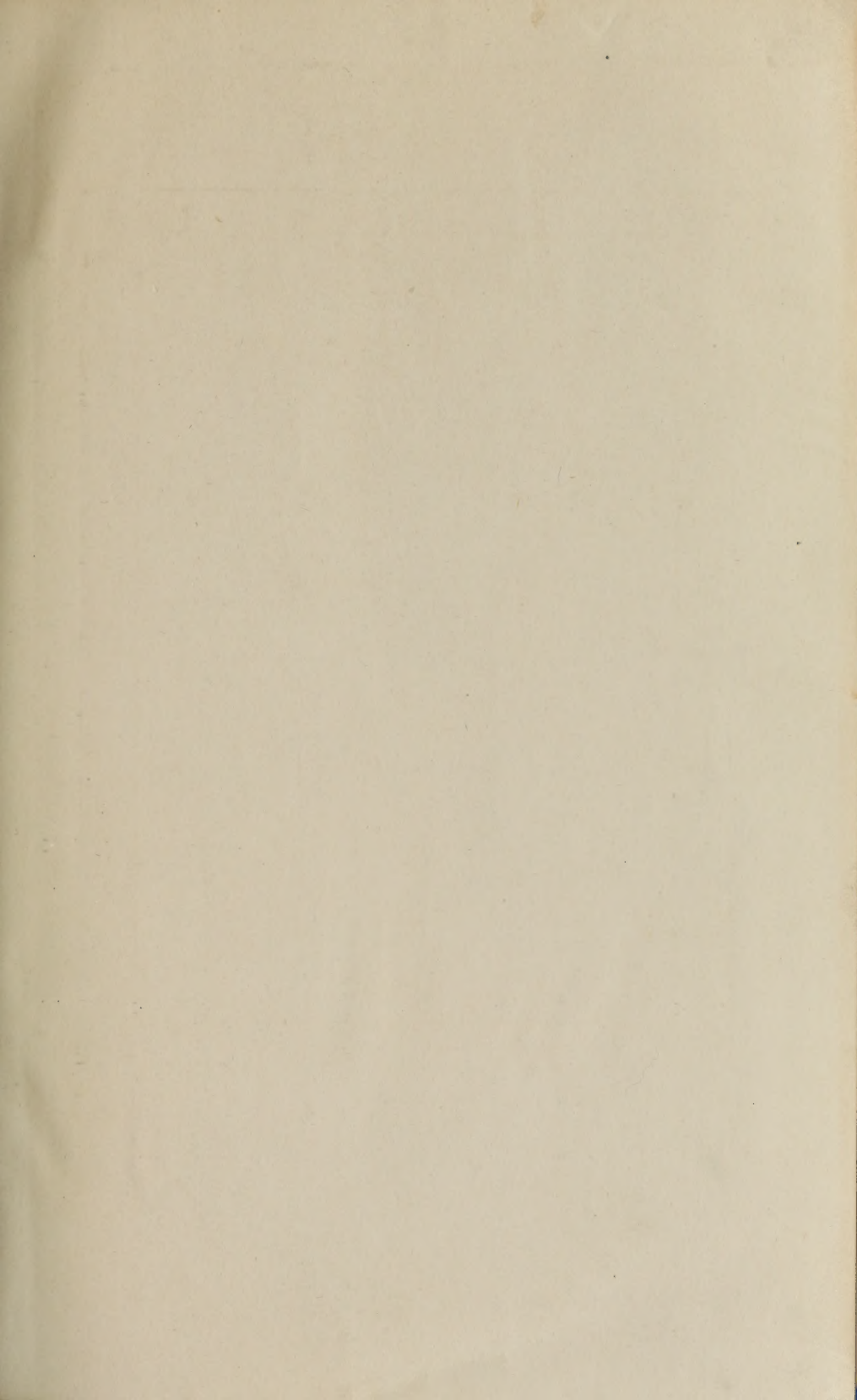
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United States
Circuit Court of Appeals
For the Ninth Circuit.

KEANE WONDER MINING COMPANY, a Corporation,

Plaintiff in Error,
vs.

JAMES CUNNINGHAM,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court
of the District of Nevada.

Filed

JAN 25 1915

F. D. Monckton,
Clerk.

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For the Ninth Circuit.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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*In the District Court of the Seventh Judicial District
of the State of Nevada, in and for the County of
Esmeralda.*

JAMES CUNNINGHAM,

Plaintiff,

vs.

KEANE WONDER MINING COMPANY, a Cor-
poration,

Defendant.

Complaint.

Plaintiff complains of defendant, and for cause of action alleged:

I. That defendant is and at all times hereinafter mentioned was a corporation duly organized, existing and doing business in Nevada, California, and elsewhere under and by virtue of the laws of the State of Arizona, and engaged in mining a group of mining claims in Inyo County, California.

II. That on, to wit, the 9th day of December, 1911, defendant was engaged in driving a stope upwards from a tunnel situate in said premises, and plaintiff was at said time the servant of defendant, engaged as a mucker in removing the loose rock and earth broken down from the roof and walls of said stope in the course of the excavation thereof, and was compelled by his said employment to be in said tunnel and under said stope.

III. That defendant had at said time in charge of said work a superintendent upon whom defendant placed the duty of keeping the place where de-

fendant's servants were employed in a safe condition; that reasonable care for the safety of defendant's servants compelled by their employment to be in said tunnel and under said stope required that the roof and walls, and especially the roof of said stope, should be supported by timbers or otherwise to prevent the falling of rock and earth which should become detached therefrom by reason of their own weight or overburden or the operation of the law of gravity or other natural causes, but defendant negligently failed to have timbers so installed or otherwise to support said roof and walls, and the same were without any support whatsoever.

IV. That at said time there was and still is in force and effect in the State of California an Act of the Legislature of said State entitled, "An Act relating to the liability of employers for injuries or death [1*] sustained by their employees, providing for compensation for the accidental injury of employees, establishing an industrial accident board, making an appropriation therefor, defining its powers and providing for a review of its awards," approved March 8, 1911, which said Act provided and provides, among other things, that in any action to recover damages for a personal injury sustained within the State of California by an employee while engaged in line of his duty or the course of his employment as such, in which recovery is sought upon the ground of want of ordinary or reasonable care of the employer, or of any officer, agent or servant of the employer, the fact that such employee may have been guilty of con-

*Page-number appearing at foot of page of original certified Record.

tributory negligence shall not bar a recovery therein where his contributory negligence was slight and that of the employer was gross, in comparison, but the damages may be diminished by the jury in proportion to the amount of negligence attributable to such employee, and it shall not be a defense, (1) that the employee either expressly and impliedly assumed the risk of the hazard complained of; (2) that the injury or death was caused in whole or in part by the want of ordinary or reasonable care of a fellow-servant. That said act further provided and provides that the liability of employers who shall not have declared their election to be bound by the provisions of said act shall be the same as if said act had not been passed, but shall be subject to the hereinabove quoted provisions of the act. The defendant had not at said time and has never since said time elected to be bound by the provisions of said act.

V. That the duty of keeping said premises in a safe condition was not placed by defendant upon plaintiff, and plaintiff was not aware that rock and earth were liable to fall from the walls and roof of said stope, and that the place wherein he was so employed was unsafe because of defendant's failure to keep said stope properly timbered or otherwise supported.

VI. That while plaintiff was performing his work as such mucker and while necessarily in said tunnel and under said stope, and without any negligence on his part, a large body of rock and earth, by reason of their [2] own weight and overburden and the operation of the law of gravity or other natural

cause, and because the walls and roof of said stope were not properly timbered or otherwise supported, fell from said walls and roof upon plaintiff, fracturing and splintering the bone of his left leg.

VII. That no medical assistance was to be had at said mine or nearer thereto than the town of Goldfield, Esmeralda County, Nevada, and plaintiff was compelled to have himself transported from said mine to Goldfield, a distance of about one hundred (100) miles, in an automobile, over rough roads, causing him intense physical pain; that in order to bring the parts of said broken limb together he was compelled to have about two (2) inches of said bone removed, and he is and will be thereby crippled and incapacitated from efficient work for life; and that he has been since December 10, 1911, and still is confined in a hospital at Goldfield, and has suffered and still suffers great physical pain, and will for the rest of his life be subjected to great inconvenience and humiliation by reason of the shortening of said limb, all to his damage in the sum of twenty-five thousand dollars (\$25,000.00), and his costs in this action.

AUGUSTUS TILDEN,

Attorney for Plaintiff.

State of Nevada,

County of Esmeralda,—ss.

James Cunningham, being first duly sworn, deposes and says: That he is the plaintiff above-named; that he has read the above and foregoing complaint and knows the contents thereof, and that the same is true of his own knowledge.

JAMES CUNNINGHAM.

Subscribed and sworn to before me this 15 day of June, A. D. 1912.

My commission expires January 17th, 1914.

[Seal]

CARROLL HENDERSON,

Notary Public, in and for the County of Esmeralda,
State of Nevada.

[Endorsed]: 3557. Box 385. In the District Court of the Seventh Judicial District of the State of Nevada, in and for the County of Esmeralda. James Cunningham, Plaintiff, vs. Keane Wonder Mining Company, a Corporation, Defendant. Complaint. Filed July 6th, 1912. Joseph Hamilton, [3] Clerk. By C. T. Golden, Deputy. Due service of the within — this — day of —, 191—. —, Attorneys for —. Augustus Tilden, Attorney for Plaintiff. Goldfield, Nevada.

No. 1576. U. S. Dist. Court, Dist. Nevada. Filed September 18, 1912. T. J. Edwards, Clerk.

[Order of Removal.]

*In the District Court of the Seventh Judicial District
of the State of Nevada, in and for the County of
Esmeralda.*

JAMES CUNNINGHAM,

Plaintiff,

vs.

KEANE WONDER MINING COMPANY, a Corporation,

Defendant.

This cause coming on for hearing upon the application of the defendant herein for an order transferring this cause to the United States District Court for the District of Nevada, and it appearing to the Court that the defendant has filed his petition for such removal in due form of law and given the requisite notice therefor, and that the defendant has filed his bond duly conditioned with good and sufficient securities as provided by law, and it appearing to the Court that this is a proper cause for removal to said District Court,

Now, therefore, it is hereby ordered and adjudged that this cause be and is hereby removed to the United States District Court for the District of Nevada, and the clerk is hereby directed to make up the record in said cause for transmission to said court forthwith.

Done in open court this 21st day of August, 1912.

PETER J. SOMERS,

Judge of the Above-entitled District Court.

[Endorsed]: 3557. Box 385. In the District Court of the Seventh Judicial District of the State of Nevada, in and for the County of Esmeralda. James Cunningham, Plaintiff, vs. Keane Wonder Mining Company, a Corporation, Defendant. Order. Filed Aug. 21, 1912. Joseph Hamilton, Clerk. By Benj. Rosenthal, Deputy.

No. 1576. U. S. Dist. Court, Dist. Nevada. Filed September 18, 1912. T. J. Edwards, Clerk. [4]

*In the District Court of the Seventh Judicial District
of the State of Nevada, in and for the County of
Esmeralda.*

JAMES CUNNINGHAM,

Plaintiff,

vs.

KEANE WONDER MINING COMPANY, a Cor-
poration,

Defendant.

Demurrer.

Comes now the defendant above named, and without submitting itself to the jurisdiction of the above-entitled court, demurs to the complaint of plaintiff on file herein, and upon the following grounds, to wit:

1. That it appears upon the face of the complaint that the Court has no jurisdiction of the person of the defendant.

2. That it appears upon the face of the complaint that the Court has no jurisdiction of the subject of the action.

Wherefore, plaintiff prays judgment on demurrer that said action be dismissed, and that defendant recover its costs of suit incurred herein.

B. M. AIKINS,

Attorney for Defendant.

[Endorsed]: No.3557. Box 385. In the District Court of the Seventh Judicial District of the State of Nevada, in and for the County of Esmeralda. James Cunningham, Plaintiff, vs. Keane Wonder

This cause coming on for hearing upon the application of the defendant herein for an order transferring this cause to the United States District Court for the District of Nevada, and it appearing to the Court that the defendant has filed his petition for such removal in due form of law and given the requisite notice therefor, and that the defendant has filed his bond duly conditioned with good and sufficient securities as provided by law, and it appearing to the Court that this is a proper cause for removal to said District Court,

Now, therefore, it is hereby ordered and adjudged that this cause be and is hereby removed to the United States District Court for the District of Nevada, and the clerk is hereby directed to make up the record in said cause for transmission to said court forthwith.

Done in open court this 21st day of August, 1912.

PETER J. SOMERS,

Judge of the Above-entitled District Court.

[Endorsed]: 3557. Box 385. In the District Court of the Seventh Judicial District of the State of Nevada, in and for the County of Esmeralda. James Cunningham, Plaintiff, vs. Keane Wonder Mining Company, a Corporation, Defendant. Order. Filed Aug. 21, 1912. Joseph Hamilton, Clerk. By Benj. Rosenthal, Deputy.

No. 1576. U. S. Dist. Court, Dist. Nevada. Filed September 18, 1912. T. J. Edwards, Clerk. [4]

*In the District Court of the Seventh Judicial District
of the State of Nevada, in and for the County of
Esmeralda.*

JAMES CUNNINGHAM,

Plaintiff,

vs.

KEANE WONDER MINING COMPANY, a Cor-
poration,

Defendant.

Demurrer.

Comes now the defendant above named, and without submitting itself to the jurisdiction of the above-entitled court, demurs to the complaint of plaintiff on file herein, and upon the following grounds, to wit:

1. That it appears upon the face of the complaint that the Court has no jurisdiction of the person of the defendant.

2. That it appears upon the face of the complaint that the Court has no jurisdiction of the subject of the action.

Wherefore, plaintiff prays judgment on demurrer that said action be dismissed, and that defendant recover its costs of suit incurred herein.

B. M. AIKINS,

Attorney for Defendant.

[Endorsed]: No.3557. Box 385. In the District Court of the Seventh Judicial District of the State of Nevada, in and for the County of Esmeralda. James Cunningham, Plaintiff, vs. Keane Wonder

Mining Company, a Corporation, Defendant. Demurrer. Dated August —, 1912. Service admitted Aug. 20, 1912. Aug. Tilden, Atty. for Plff. Filed August 21, 1912. Joseph Hamilton, Clerk. By Benj. Rosenthal, Deputy.

No. 1576. U. S. Dist. Court, Dist. Nevada. Filed September 18, 1912. T. J. Edwards, Clerk.

[Order Sustaining Demurrer, etc.]

No. 1576.

“JAMES CUNNINGHAM

vs.

KEANE WONDER MINING CO.

ORDER OF COURT SUSTAINING THE DEMURRER, AS ENTERED ON THE MINUTES, OF DATE APRIL 7th, 1913.

On motion of Mr. Dixon and pursuant to stipulation on file, it is ordered that the firm name of Dixon & Miller be, and is hereby entered and substituted as the attorney for plaintiff in the place of Augustus Tilden. It is further ordered that the firm name of Sweeney [5] & Morehouse be added as associate counsel for the defendant. By consent, and on motion of plaintiff, it is ordered that the demurrer herein be, and the same is hereby, sustained; and that plaintiff is given until the next Motion Day to amend his complaint.”

*In the District Court of the United States, for the
District of Nevada.*

JAMES CUNNINGHAM,

Plaintiff,

vs.

KEANE WONDER MINING COMPANY, a Cor-
poration,

Defendant.

Amended Complaint.

The plaintiff, by Dixon & Miller, his attorneys, complaining of the defendant, alleges as follows:

I. That at all the times herein mentioned the defendant was and now is a mining corporation organized and existing under the laws of the State of Arizona, and during such time has owned and operated and now owns and operates a certain mine in Inyo County, State of California, commonly known as and called the Keane Wonder Mine; and that during such time, the defendant has been duly authorized to do business within the State of Nevada, and has kept a place of business therein at which defendant has conducted and carried on its ordinary business.

II. That prior to the 9th day of December, 1911, the plaintiff was engaged and employed by the defendant to work as a miner and mucker in said mine, at the rate of \$4.00 per day, and pursuant thereto plaintiff was, on said 9th day of December, 1911, an employee of defendant in said mine and engaged in the line of his duty and in the course of his em-

ployment as such employee; that it became and was the duty of defendant to furnish plaintiff a safe place to work and safe ways, works, machinery and appliances therefor, and to use ordinary and reasonable care in its methods of operating said mine and extracting the ore, rock and other material therefrom; but defendant by and through its own negligence and the negligence and carelessness of its officers, agents and other servants, failed and neglected to furnish plaintiff with a safe place to work and safe ways, works, machinery and appliances therefor, and failed and neglected [6] to exercise ordinary or reasonable care in its methods of operating said mine and extracting the ore, rock and other materials therefrom; but on the contrary the defendant, its officers, agents and other servants negligently and carelessly drove a certain stope upward from a tunnel situated in said mine, and failed and neglected to use ordinary or reasonable care in the examination and inspection of the roof or top of said stope, and failed and neglected to pick or bar down from said roof or top of said stope, loose rock and ore therein or thereat; and caused and permitted the said plaintiff to work in the course of his employment in said tunnel at the bottom of said stope, while the said stope was in a dangerous condition owing to the negligence of the defendant, its officers, agents and servants, in not properly timbering the same, and in not properly examining and inspecting the same, and in not properly picking or barring down the loose rock at the roof or top of said stope; by reason whereof, a mass of ore

and rock fell from the top or roof of said stope on and upon the plaintiff while so engaged in the line of his duty and in the course of his employment, so that plaintiff was cut, scratched, bruised, wounded and hurt on left leg, back, and other parts of his body, and suffered excruciating pain and agony of body and mind, and was rendered sick, sore and lame, and his left leg was broken and splintered, and that in endeavoring to have the same healed and cured, it became and was necessary to have about two inches of said bone removed, so that said left leg is now much shorter than the right leg, and his nervous system has been greatly injured and disabled, and plaintiff was disabled from attending to his regular business and employment, or of performing any work up to the commencement of this action, and the making of this amended complaint; and his left leg and his back and his nervous system are permanently injured, paralyzed and disabled, so that he will be prevented and disabled from attending to his regular business as miner and mucker during the remainder of his life as he believes, and his earning capacity has been lost and destroyed, and he believes and therefore alleges, that he will, during the remainder of his life, be helpless and require the care and attendance of others.

III. That plaintiff has been obliged to expend large sums of money and [7] to incur liabilities for medical and surgical attendance, for medicines, nursing, board, lodging and travelling expenses in endeavoring to have himself cured of said injuries, wounds, bruises and maladies.

IV. That at the time of the said injuries so suffered by the plaintiff, and at the time of the commencement of this action, and at the present time, there was in force and effect in the State of California, a statute or law providing, among other things, that in any action to recover damages for a personal injury sustained within the State of California by an employee, engaged in the line of his duty or the course of his employment as such, in which recovery is sought upon the ground of want of ordinary or reasonable care of the employer, or of any officer, agent or servant of the employer, it shall not be a defense: (1) that the employee either expressly or impliedly assumed the risk of the hazard complained of, and (2) that the injury was caused in whole or in part by the want of ordinary or reasonable care of a fellow-servant.

V. And plaintiff says that by reason of said injuries and of the premises, he has suffered loss and damage, for loss of time at the rate of \$4.00 per day, for medical, surgical and hospital attendance, nursing, board, lodging and necessary travelling expenses, for mental agony and distress, for physical suffering and distress, for permanent injury and impairment of earning capacity, and for exemplary or punitive damages by reason of the gross and wanton negligence and carelessness of the defendant, its officers, agents and servants, in the sum of Fifty Thousand (\$50,000.00) Dollars.

Wherefore, the plaintiff demands judgment against the defendant for fifty thousand dollars,

for loss and damage sustained by him, with his costs and expenses of suit.

DIXON & MILLER,
Attorneys for Plaintiff.

State of Nevada,
County of Washoe.—ss.

A. Grant Miller, being first duly sworn, deposes and says: That he is one of the attorneys of record for the above-named [8] plaintiff, and that the attorneys for the plaintiff reside at Reno, in Washoe County, State of Nevada; that the above-named plaintiff is not now within said County of Washoe, and for this reason this verification is made by deponent; that deponent has read the foregoing amended complaint and knows the contents thereof, and that on his information and belief, he says the same is true.

A. GRANT MILLER.

Subscribed and sworn to before me this 9th day of May, A. D. 1913.

[Seal]

J. B. DIXON,
Notary Public.

Service of a copy of the within amended complaint admitted this 9th day of May, 1913.

SWEENEY & MOREHOUSE,
Attorneys for Defendant.

[Endorsed]: No. 1576. In the District Court of the United States for the District of Nevada. James Cunningham, Plaintiff, vs. Keane Wonder Mining Company, a Corporation, Defendant. Amended Complaint. Filed May 10, 1913. T. J. Edwards,

Clerk. Dixon & Miller, Reno, Nevada, Attorneys
for Plaintiff.

*In the District Court of the United States, for the
District of Nevada.*

JAMES CUNNINGHAM,

Plaintiff,

vs.

KEANE WONDER MINING COMPANY, a Corpo-
ration,

Defendant.

Answer to Amended Complaint.

Comes now the defendant, Keane Wonder Mining Company, a corporation, and answering plaintiff's amended complaint, admits, avers and denies as follows:

1. Admits that defendant is a mining corporation organized and existing under and by virtue of the laws of the State of Arizona. Admits that during all the times mentioned in said amended complaint it has owned and operated, and does now own and operate, a certain mine in Inyo County, State of California, commonly known as and called the Keane Wonder Mine. [9]

Denies that during the times mentioned in said amended complaint this defendant has been duly authorized to do business within the State of Nevada; denies that it has kept a place of business therein at which it has conducted and carried on or conducted or carried on its ordinary business or any other business at all.

Admits that on and prior to the 9th day of December, 1911, plaintiff was engaged and employed by this defendant to work as a miner and mucker in said mine at the rate of four dollars per day; admits that said plaintiff was so employed and was so working on said 9th day of December, 1911; admits that it was and is the duty of this defendant to furnish plaintiff, and all other employees, a safe place to work and safe ways, works, machinery and appliances therefor, admits that it was and is the duty of this defendant to use ordinary and reasonable care in its methods of operating said mine and extracting the ore, rock and other material therefrom, and in this behalf defendant avers the fact to be that at all times during plaintiff's employment as aforesaid defendant did furnish plaintiff, and all other employees, safe places to work and safe ways, works, machinery and appliances therefor, and further avers that defendant did use ordinary and reasonable care in its methods of operating said mine and in extracting the ore and rock therefrom.

Denies that by and through its negligence, or the negligence and carelessness of its officers, agents and other servants, or officers or agents or other servants, or either or any of them, defendant failed and neglected or failed or neglected to furnish plaintiff a safe place to work or safe ways, works, machinery and appliances, or safe works or safe machinery or safe appliances therefor; denies that it failed and neglected or failed or neglected to exercise ordinary or reasonable care or ordinary and reasonable care in its methods of operating said

mine and extracting or extracting the ore, rock and other materials or ore or rock or other materials therefrom; denies that this defendant, its officers, agents and other servants, or this defendant or its officers or agents or other servants, negligently and carelessly or negligently or carelessly drove a certain stope upward from a tunnel situated in said mine, and failed [10] and neglected or failed or neglected to use ordinary or reasonable care or ordinary and reasonable care in the examination and inspection or examination or inspection of the roof or top of said stope; denies that it failed and neglected or failed or neglected to pick or bar down or pick and bar down from said roof or top of said stope, loose rock and ore or loose rock or ore therein or thereat; denies that it caused and permitted or caused or permitted said plaintiff to work, in the course of his employment, in said tunnel at the bottom of said stope, or at any other place in said mine, while said stope or any other stope was in a dangerous condition owing to the negligence of this defendant or its officers or agents or servants, or either or any of them; denies that said stope was in a dangerous condition; denies that said stope was not properly timbered; denies that it did not properly examine and inspect said stope and said timbering or said stope or said timbering; denies that it did not properly pick or bar down or pick and bar down the loose rock at the roof or top of said stope; denies that by reason of said alleged improper timbering, or said alleged improper examination and inspection of the same, and said alleged failure to properly

pick or bar down the loose rock at the roof or top of said stope, a mass of ore and rock or ore or rock fell from the top or roof of said stope upon plaintiff while engaged in the line of his duty and in the course of his employment or in the line of his duty or in the course of his employment, as in said amended complaint set forth.

Admits that on or about December 9, 1911, while plaintiff was in said mine, a body of ore and rock fell upon plaintiff and broke his left leg and otherwise bruised and scratched him.

And defendant avers the fact to be that whatever injuries were sustained by plaintiff while in said mine were sustained by him while off duty and when not engaged in any work or duty by reason of his employment aforesaid, and in this behalf defendant avers the fact to be that plaintiff violated the positive instructions of this defendant and entered into an old abandoned stope in said mine for reasons and purposes unknown to this defendant, but known to defendant not to be for any purpose in the line of his duty or in the course of his employment, and not by reason of any order or [11] command of this defendant, and while therein, as defendant is informed and believes, and therefore alleges, plaintiff and one Porter, on their own behalf, and without authority or right so to do, explored certain ore bodies and broke down parts thereof, and while so engaged, a portion of said ore, so loosened by plaintiff and said Porter, fell upon plaintiff and said Porter, thereby causing the injuries complained of.

Denies that said injuries to plaintiff or the injuries

as alleged in his said complaint, happened to plaintiff or were inflicted while plaintiff was engaged in the line of his duty or in the course of his employment as such miner or mucker as alleged in said amended complaint; denies that the said injuries to plaintiff were the result of the negligence of this defendant or the negligence and carelessness of its officers, agents, and other servants, or either or any of them, in not properly timbering said stope, or in not properly examining and inspecting the same, or in not properly picking or barring down the loose rock at the roof or top of said stope, or in not furnishing plaintiff with a safe place to work or safe ways, works, machinery or appliances therefor.

Defendant has no information or belief upon the subject sufficient to enable it to answer the allegations of Paragraph *LL* of plaintiff's amended complaint, to wit: "and his nervous system has been greatly injured and disabled, and plaintiff was disabled from attending to his regular business and employment, or of performing any work up to the commencement of this action, and the making of this amended complaint, and his left leg and his back and his nervous system are permanently injured, paralyzed and disabled so that he will be prevented and disabled from attending to his regular business as miner and mucker during the remainder of his life, as he believes, and his earning capacity has been lost and destroyed, and he believes, and therefore alleged, that he will, during the remainder of his life, be helpless, and require the care and attendance of others," and basing its denial upon that ground, denies that plain-

tiff's nervous system has been greatly injured and disabled or injured or disabled; denies that plaintiff was disabled from attending to his regular business and employment, [12] or of performing any work up to the commencement of this action or the making of this amended complaint; denies that plaintiff's left leg and his back and his nervous system, or his left leg or his back or his nervous system are permanently injured, paralyzed and disabled, or permanently injured or permanently paralyzed or permanently disabled so that he will be prevented and disabled or prevented or disabled from attending to his regular business as miner and mucker during the remainder of his life, as he believes; denies that plaintiff's earning capacity has been lost and destroyed or lost or destroyed; denies that plaintiff will, during the remainder of his life, be helpless and require the care and attendance or care or attendance of others.

III. Defendant has no information or belief upon the subject sufficient to enable it to answer the allegations of Paragraph III of plaintiff's amended complaint, and basing its denial upon that ground, denies that plaintiff has been obliged to expend large sums of money or any sums of money, or to incur liabilities for medical and surgical attendance or medicines or nursing or board or lodging or travelling expenses, or either or any of them, in endeavoring to have himself cured of said injuries, wounds, bruises and maladies.

IV. Defendant has no information or belief upon the subject sufficient to enable it to answer the allega-

tions of paragraph V of plaintiff's amended complaint, and basing its denial upon that ground, denies that by reason of negligence or carelessness on the part of this defendant or of any of its officers, agents or servants, as alleged in said amended complaint, or otherwise or at all, plaintiff suffered loss and damage or loss or damage for medical, surgical and hospital attendance, nursing, board, lodging and necessary travelling expenses, or either or any of them, or for mental agony, or for physical suffering and distress, or for permanent injury and impairment of earning capacity, or for exemplary or punitive damages by reason of the gross and wanton or gross or wanton negligence and carelessness of this defendant or its officers, agents or servants, or either or any of them, in the sum of fifty thousand dollars, or in any other sum or at all.

And for a further, separate and second defense, defendant avers: [13]

I. That the injury to plaintiff, as in his said amended complaint alleged, was without any fault on the part of defendant, and was caused by the fault and negligence of the plaintiff himself in this; that in said mine, on December 9, 1911, were and are old, abandoned stopes which were and are not used for any purpose by defendant or its employees, and the fact was, and is, that at all times mentioned in said amended complaint, and now, this defendant had issued a standing order to all its employees, forbidding them to enter the old worked-out portions of said mine, and particularly the said abandoned stope hereinafter referred to, and had marked and desig-

nated a certain line in said mine known as the "dead line," beyond which all employees were forbidden to go. That this order was communicated to and known by plaintiff during the time of his employment as alleged in his said amended complaint.

II. That on or about December 9, 1911, while off duty, plaintiff violated said order, and without right, permission or authority, crossed said "dead line" and entered upon and into said abandoned and worked-out portion of said mine, and whilst in an abandoned stope therein, as defendant is informed and believes, and therefore alleges, plaintiff, and one Frank Porter, on their own initiative, and in their own behalf, and without authority or right so to do, explored certain ore bodies therein, and loosened and broke down parts thereof, and plaintiff then and there so negligently and carelessly conducted himself that by reason of his negligence and carelessness a part of the ore so loosened fell upon plaintiff, thereby causing the injuries complained of; defendant avers that at the time of said injury to plaintiff, as in said amended complaint set forth, plaintiff was not engaged in any work or duty by reason of any order or command of this defendant, or by virtue of his employment, as alleged in said amended complaint; and avers that if any damage or injury resulted to plaintiff, it was by the said negligence of plaintiff, and not the fault of defendant.

And for a further, separate and third defense, defendant avers:

I. That all times during plaintiff's employment by defendant as a miner in its said mine, and particularly

on December 9, 1911, said [14] mine was equipped with suitable and safe works, machinery and appliances therefor, and defendant furnished plaintiff therein safe places for him to perform all work in the line of his duties, or in the course of his employment, and in this behalf defendant avers that it was the duty of the plaintiff to make his own place to work; that on December 9, 1911, without fault or negligence on the part of defendant, plaintiff was injured in defendant's mine; that said injury was a risk or danger assumed by plaintiff in his said employment, and plaintiff knew, or ought to have known, all the risks and dangers incident to his said employment, and particularly the risks and dangers necessarily resulting from loosened rock at the roof or top of any stope in said mine, and particularly the dangers from the falling of such loosened rock or ore from the top of such stope,

And for a further, separate and fourth defense, defendant avers:

I. That if said injury to plaintiff, as alleged in said amended complaint, was due to the fault or negligence of any person other than plaintiff himself, it was by the want of ordinary or reasonable care of plaintiff's fellow-servants, and not by the fault and negligence of defendant, and in this behalf defendant avers that it was the duty of plaintiff and his said fellow-servants engaged at work in said mine on or about December 9, 1911, to break down and extract the ore therefrom, and in so doing it was a part of their duties to do such timbering as was necessary for the protection of themselves, or other employees, and the

mine itself, and it was the further duty of plaintiff and his fellow-servants to pick and bar down all loose rock, ore or other material at the roof or top of any stope in any place in said mine which would, in any way, be dangerous to plaintiff, or any other person in said mine; that if plaintiff was injured, as set forth in his said amended complaint, it was by the fault and negligence of himself and his fellow-servants in not properly picking or barring down, as was their bounded duty, the loose rock and ore which it is alleged fell upon and injured plaintiff.

And for a further, separate and fifth defense, defendant avers:

I. That the injury to plaintiff, as in said amended complaint alleged, [15] was occasioned by causes purely accidental, and by no reason of negligence or want of ordinary or reasonable care on the part of defendant.

And for a further, separate and sixth defense, defendant avers:

I. That at all the times mentioned in said amended complaint, defendant was, and is, a corporation, duly organized and existing under and by virtue of the laws of the State of Arizona, and having its principal office and place of business, at Keane Wonder, Inyo County, California, and there operated the Keane Wonder Mine; that the injury to plaintiff, as alleged in his said amended complaint, occurred at said mine in said State of California; that defendant, on the 9th day of December, 1911, was not, and is not now, engaged in business in the State of Nevada, and did not, and does not now, maintain an office therein; that at

all times since said 9th day of December, 1911, this defendant has continued to operate said mine, and has maintained its principal office and place of business in the said State of California, and its officers have resided therein, all of which was and is known to plaintiff.

II. That the said plaintiff by this action seeks to enforce a right given him under and by virtue of the laws of the State of California, Statutes of 1911, page 796, which said laws are materially and fundamentally different from the laws of the State of Nevada in relation to the same subject; and this defendant therefore respectfully pleads that plaintiff should not be allowed to assert and enforce in this Honorable Court, representing, as it does, the District of the State of Nevada, a right given him under the laws of the State of California which are materially and fundamentally different from the laws of the State of Nevada in relation to the same subject.

Wherefore, defendant having fully answered, prays that this action be hence dismissed, and that it have judgment or its costs herein expended.

SWEENEY & MOREHOUSE,

B. M. AIKINS,

Attorneys for Defendant.

GAVIN McNAB,

A. H. JARMAN,

Of Counsel. [16]

State of California,

City and County of San Francisco,—ss.

B. M. Aikins, being first duly sworn, deposes and says: That he is the attorney of record for the above-

named defendant, and resides and has his office in the City and County of San Francisco, State of California; that neither the above-named defendant nor any of its officers are now within said City and County of San Francisco, and for this reason this verification is made by the affiant; that affiant has read the foregoing answer to plaintiff's amended complaint and knows the contents thereof, and that on his information and belief, he says the same is true.

B. M. AIKINS.

Subscribed and sworn to before me this 14th day of July, A. D. 1913.

[Seal]

CHARLES R. HOLTON,

Notary Public in and for the City and County of San Francisco, State of California.

Received a copy of the foregoing answer to amended complaint this 15th day of July, 1913.

DIXON & MILLER,

Attorneys for Plaintiff.

[Indorsed]: In the District Court of the United States for the District of Nevada. James Cunningham, Plaintiff, vs. Keane Wonder Mining Company, a Corporation, Defendant. Answer to Amended Complaint. Filed July 16, 1913. T. J. Edwards, Clerk. No. 1576.

*In the District Court of the United States for the
District of Nevada.*

JAMES CUNNINGHAM,

Plaintiff,

vs.

KEANE WONDER MINING COMPANY, a Corporation,

Defendant.

Demurrer to Part of Answer.

Now comes the plaintiff, and demurs to the further, separate and fourth defense of the defendant contained in defendant's [17] answer, and for grounds of demurrer alleges:

I. That said separate and fourth defense does not set forth facts sufficient to constitute a defense to the plaintiff's cause of action as alleged in his complaint.

II. That it constitutes no defense to the plaintiff's cause of action as set out in his amended complaint that the injuries to the plaintiff were due to the want of ordinary or reasonable care of plaintiff's fellow-servants; nor to allege that it was the duty of the plaintiff's fellow-servants engaged at work in said mine to break down and extract the ore therefrom, and in so doing to do such timbering as was necessary for the protection of themselves or other employees and the mine itself; nor to allege that it was the duty of the plaintiff's fellow-servants to pick and bar down the loose rock, ore or other material at the roof or top of any stope in any place in said mine which would, in any way, be dangerous to plaintiff or any other

person in said mine; nor to allege that the injuries suffered by the plaintiff were caused by the fault and negligence of his fellow-servants in not properly picking or barring down the loose rock and ore which fell upon and injured plaintiff.

And the plaintiff further demurs to the further, separate and sixth defense of the defendant set out in his said answer, and for grounds of demurrer avers as follows:

I. That the said separate and sixth defense does not state facts sufficient to constitute any valid defense to the plaintiff's cause of action as set forth in his amended complaint.

II. That service of summons and complaint was made upon defendant within the State of Nevada.

III. That the defendant by filing demurrer and by answering to the merits has waived any benefit that might or could arise from any of the facts alleged in said separate and sixth defense.

IV. That it does not constitute any defense to the plaintiff's amended complaint to allege that the defendant has maintained its principal office and place of business in the State of California, or that its officers have resided therein. [18].

V. That the plaintiff's action is a transitory one, and may be brought in any State wherein the plaintiff is engaged in business or can be found, or service affected within said State.

VI. That the plaintiff in his complaint has specifically set out a portion of the laws of the State of California applicable to the plaintiff's cause of action

as being brought within the State of Nevada.

DIXON & MILLER,

Attorneys for Plaintiff.

I hereby certify that in my opinion the foregoing demurrer is well founded in point of law.

J. B. DIXON,

Of Counsel for Plaintiff.

Service of a copy of the within Demurrer, acknowledged this 7th day of August, 1913.

SWEENEY & MOREHOUSE,

Attorneys for Defendant.

[Indorsed]: No. 1576. In the District Court of the United States for the District of Nevada. James Cunningham, Plaintiff, vs. Keane Wonder Mining Company, a Corporation, Defendant. Demurrer to Part of Answer. Filed August 8th, 1913. T. J. Edwards, Clerk. Dixon & Miller, Attorneys for Plaintiff.

[Order Overruling Demurrer.]

ORDER OF COURT OVERRULING DEMUR-
RER TO ANSWER, AS ENTERED ON THE
JOURNAL, OF DATE OCTOBER 6th, 1913.

No. 1576.

JAMES CUNNINGHAM

vs.

KEANE WONDER MG. CO.

The demurrer to answer, and motion to strike therefrom, were this day argued and submitted by Mr. Dixon, of attorneys for plaintiff,—no counsel ap-

pearing for the defendant. In consideration of the premises, it is ordered that the motion to strike be, and is hereby granted, and the demurrer overruled.

*In the District Court of the United States for the
District of Nevada.*

JAMES CUNNINGHAM,

Plaintiff,

vs.

KEANE WONDER MINING COMPANY, a Cor-
poration,

Defendant.

Plaintiff's Reply [to Answer].

Now comes the plaintiff by Dixon & Miller, his attorneys, and for reply to affirmative matter set up in the answer of the [19] defendant, says as follows:

He denies that at all times during plaintiff's employment by defendant the defendant did furnish plaintiff with safe places to work and safe ways, works, machinery and appliances therefor; and denies that defendant did use ordinary and reasonable care in its methods of operating the mine referred to in the complaint and answer and in extracting the ore and rock therefrom.

He specifically denies each and every allegation, averment and particular contained in the last paragraph on page 4 of defendant's answer commencing at line 12 and ending at line 30.

He specifically denies each and every allegation, item and particular contained in paragraphs 1 and 2 of a further, separate and second defense contained

in the defendant's answer and commencing at line 23 on page 7, all of page 8, and continuing up to and including line 3 on page 9 of said answer.

He denies each and every allegation, item and particular contained in paragraph 1 of a further, separate and third defense contained in said answer and commencing at line 7 to and including line 25 on page 9 of said answer.

He denies each and every allegation and particular contained in paragraph 1 of a further, separate and fifth defense contained in said answer and commencing at line 25 and ending on line 30 on page 10 of said answer.

DIXON & MILLER,
Attorneys for Plaintiff.

State of Nevada,
County of Washoe,—ss.

A. Grant Miller, being first duly sworn, deposes and says: That he is one of the attorneys of record for the above named plaintiff; that the attorneys for said plaintiff reside at Reno, in the County of Washoe, in the State of Nevada; and that the above-mentioned plaintiff is not now within said county, by reason whereof deponent makes this verification; that he has read the foregoing Reply and knows the contents thereof; and on information and belief, says that the same is [20] true.

A. GRANT MILLER.

Subscribed and sworn to before me this 6th day of August, A. D. 1913.

[Seal]

J. B. DIXON,
Notary Public.

Service of a copy of the within Reply admitted this
7th day of August, 1913,

SWEENEY & MOREHOUSE,
Attorneys for Defendant.

[Indorsed]: No. 1576. In the District Court of
the United States for the District of Nevada. James
Cunningham, Plaintiff, vs. Keane Wonder Mining
Company, a Corporation, Defendant. Plaintiff's
Reply. Filed August 8th, 1913. T. J. Edwards,
Clerk. Dixon & Miller, Attorneys for Plaintiff.

[Verdict.]

*In the District Court of the United States for the
District of Nevada.*

No. 1576.

JAMES CUNNINGHAM,

Plaintiff,

vs.

KEANE WONDER MINING COMPANY, a Cor-
poration,

Defendant.

We, the jury in the above-entitled cause find for the
plaintiff and assess the damages at \$12,500.00.

Dated November 26, 1913.

BURT DAKE,
Foreman.

[Indorsed]: No. 1576. U. S. Dist. Court, Dist.
Nevada. James Cunningham, vs. Keane Wonder
Mining Company, a Corporation. Verdict. Filed
November 26, 1913. T. J. Edwards, Clerk.

[Judgment.]

*In the District Court of the United States for the
District of Nevada.*

No. 1576.

JAMES CUNNINGHAM,

Plaintiff,

vs.

KEANE WONDER MINING COMPANY, a Cor-
poration,

Defendant.

This cause came on regularly for trial at the October Term, 1913, to wit, on the 19th day of November, 1913, by a jury of twelve persons duly accepted by the parties and sworn to try the issue. [21]

The parties and their respective attorneys appeared, introduced their proofs, oral and documentary, and, after argument, submitted the cause; and the jury having been instructed by the Court as to the law of the case retired for deliberation and shortly thereafter came into Court with their verdict in favor of the plaintiff for the sum of twelve thousand and five hundred dollars.

It is therefore ordered and adjudged that the plaintiff have and recover of and from the said defendant, Keane Wonder Mining Company, a corporation, the sum of twelve thousand and five hundred dollars (\$12,500), with interest thereon from this date until paid at the rate of seven per cent per annum, together with his legal costs and disbursements herein incurred, taxed at \$438.95.

Dated and entered, this 26th day of November, 1913.

Attest: T. J. EDWARDS,
Clerk. [22]

*In the District Court of the United States in and for
the District of Nevada.*

No. 1576.

JAMES CUNNINGHAM,

Plaintiff,

vs.

KEANE WONDER MINING COMPANY, a Corporation,

Defendant.

Petition for Writ of Error.

To the Honorable E. S. FARRINGTON, Judge of said District Court:

Now comes the Keane Wonder Mining Company, a corporation, by its attorneys, Messrs. Sweeney & Morehouse and A. H. Jarman, Esq., and respectfully shows:

That on the 26th day of November, A. D. 1913, a jury, duly empanelled, found a verdict against your petitioner and in favor of said James Cunningham, and upon said verdict, a final judgment was entered on the 14th day of March, A. D. 1914, against your petitioner, Keane Wonder Mining Company, a corporation.

Your petitioner, feeling itself aggrieved by the said verdict and judgment entered thereon as aforesaid, herewith petitions the Court for an order allowing

it to prosecute a writ of error to the Circuit Court of Appeals of the United States for the Ninth Circuit, under the laws of the United States in such cases made and provided.

Wherefore, your petitioner prays that a writ of error do issue, and that an appeal in this behalf to the United States Circuit Court of Appeals aforesaid, sitting at San Francisco, in said Circuit, for the correction of the errors complained of and herewith assigned, be allowed, and that an order be made fixing the amount of security to be given by defendant, Keane Wonder Mining Company, conditioned as the law directs.

SWEENEY & MOREHOUSE,

B. M. AIKINS,

A. H. JARMAN,

Attorneys for Defendant, Keane Wonder Mining Company, Plaintiff in Error.

GAVIN McNAB,

Of Counsel.

[Indorsed]: No. 1576. In the District Court of the United States in and for the District of Nevada. James Cunningham, Plaintiff, vs. Keane Wonder Mining Company, a Corporation, Defendant. Petition for Writ of Error. Filed July 24th, 1914. T. J. Edwards, Clerk. Sweeney & Morehouse, A. H. Jarman, Attorneys for Defendant, Merchants' National Bank Building, San Francisco, California. Phone Douglas 520. [23]

*In the District Court of the United States in and for
the District of Nevada.*

JAMES CUNNINGHAM,

Plaintiff,

vs.

KEANE WONDER MINING COMPANY, (a Corporation),

Defendant.

**Order Allowing Writ of Error [and Fixing Amount
of Bond].**

Upon motion of B. M. Aikins, Sweeney & Morehouse, and A. H. Jarman, attorneys for the defendant, Keane Wonder Mining Company, a corporation, and upon filing a petition for a writ of error, and assignments of error,

It is ordered that a writ of error be, and it hereby is, allowed to have reviewed in the United States Circuit Court of Appeals for the Ninth Circuit the judgment heretofore entered herein, and that the amount of bond on said writ of error be, and the same is, hereby fixed at One Thousand Dollars (\$1,000) ; said bond to serve as a cost bond on said writ of error.

Dated, July 22, 1914.

E. S. FARRINGTON,

Judge of the United States District Court for the
District of Nevada.

[Indorsed]: No. 1576. United States District Court, District of Nevada. James Cunningham, Plaintiff, vs. Keane Wonder Mining Company, Defendant. Order Allowing Writ of Error. Filed

July 24th, 1914. T. J. Edwards, Clerk. B. M. Aikins, Sweeney & Morehouse, A. H. Jarman, Attorneys for Defendant. [24]

*In the District Court of the United States in and for
the District of Nevada.*

No. 1576.

JAMES CUNNINGHAM,

Plaintiff,

vs.

KEANE WONDER MINING COMPANY, a Corporation,

Defendant.

Bond on Writ of Error.

Know all men by these presents: That we, Keane Wonder Mining Company, a corporation, as principal, and United States Fidelity and Guaranty Company, a corporation, duly organized and existing under and by virtue of the laws of the State of Maryland, and duly authorized to execute bonds and undertakings in judicial proceedings pending in the courts of the United States, as surety, are held and formally bound unto James Cunningham, plaintiff in the above-entitled action, in the full and just sum of one thousand (\$1,000) dollars, lawful money of the United States, to be paid to the said plaintiff, James Cunningham, his administrators, executors or assigns, to which payment well and truly to be made, we bind ourselves, our successors, assigns, executors and administrators, jointly and severally by these

presents. Signed and dated this the 21st day of July, A. D. 1914.

Whereas lately, at a regular term of the District Court of the United States for the District of Nevada, sitting at Carson City, in said District, in a suit pending in said court, James Cunningham, as plaintiff, and Keane Wonder Mining Company as defendant, Cause No. 1576, on the Law Docket of said court, final judgment was rendered against the said defendant in the sum of Twelve Thousand Five Hundred (\$12,500) Dollars, together with interest and costs, and the said defendant, Keane Wonder Mining Company has obtained a writ of error and filed a copy thereof in the clerk's office of the said court, to reverse the judgment of the said court in the aforesaid suit, and a citation directed to the said James Cunningham, defendant in error, citing him to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit [25] to be holden at the City and County of San Francisco, in the State of California, according to law, within thirty days from the date hereof,

Now the condition of the above obligation is such that if said Keane Wonder Mining Company shall prosecute its writ of error to effect and answer all damages and costs if it fail to make its plea good, then the above obligation to be void, else to remain in full force and virtue.

In Witness Whereof said Keane Wonder Mining Company, a corporation, has caused its name to be hereunto subscribed by its President thereunto duly authorized, and said United States Fidelity and

Guaranty Company, a corporation, has caused its name to be hereunto subscribed and its corporate seal to be hereunto affixed by its officers thereunto duly authorized, this 21st day of July, 1914.

KEANE WONDER MINING CO.

By HOMER WILSON,

Its President.

UNITED STATES FIDELITY AND
GUARANTY CO., OF BALTIMORE,
MD.

[Seal]

By C. H. PETERS,

Its Attorney-in-Fact.

By ALFRED CHARTZ,

Its Attorney-in-Fact.

The foregoing bond on writ of error is hereby approved, this 22 day of July, 1914. This is not approved as a supersedeas.

E. S. FARRINGTON,

Judge of the U. S. District Court for the District of
Nevada.

[Indorsed]: No. 1576. United States District Court, District of Nevada. James Cunningham, Plaintiff, vs. Keane Wonder Mining Company, a corporation, Defendant. Bond on Writ of Error. Filed July 24th, 1914. T. J. Edwards, Clerk. Sweeney & Morehouse, B. M. Aikins, A. H. Jarman, Attorneys for Defendant. [26]

*In the District Court of the United States in and for
the District of Nevada.*

No. 1576.

JAMES CUNNINGHAM,

Plaintiff,

vs.

KEANE WONDER MINING COMPANY (a Cor-
poration),

Defendant.

Writ of Error [Original].

United States of America,—ss.

The President of the United States to the Honorable E. S. FARRINGTON, Judge of the District Court of the United States for the District of Nevada, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court before you, between James Cunningham, plaintiff, and Keane Wonder Mining Company, a corporation, defendant and plaintiff in error, a manifest error hath happened to the great damage of the said Keane Wonder Mining Company, a corporation, plaintiff in error, as by said complaint appears, and we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings, with all things concerning the same, to the United States Circuit Court of

Appeals for the Ninth Circuit [27] together with this writ, so that you have the same at the City and County of San Francisco in the State of California on the 20th day of August, A. D. 1914, in the Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

WITNESS, the Honorable E. S. FARRINGTON, United States District Judge for the District of Nevada, the 22d day of July, in the year of our Lord one thousand nine hundred and fourteen.

E. S. FARRINGTON,
Clerk of the United States District Court for the
District of Nevada. [27½]

*In the District Court of the United States, in and for
the District of Nevada.*

No. 1576.

JAMES CUNNINGHAM,

Plaintiff,

vs.

KEANE WONDER MINING COMPANY, a Cor-
poration,

Defendant.

State of Nevada,
County of Washoe,—ss.

James G. Sweeney, being first duly sworn, says that he is one of the attorneys of record for the

above-named defendant in the above-entitled cause; that on the 23d day of July, 1914, in the forenoon of that day, in the County of Washoe, State of Nevada, he served upon A. Grant Miller, the citation and writ of error in the above-entitled action, to which this affidavit is attached, in the office of the attorneys for the said plaintiff, in the Journal Building, on West Second Street, City of Reno, County of Washoe, State of Nevada, by delivering to A. Grant Miller a true copy of said citation and said writ of error hereto attached.

JAMES G. SWEENEY.

Subscribed and sworn to before me this 23d day of July, 1914.

[Seal] JEROME L. VAN DEUNKER,

Notary Public in and for the County of Washoe,
State of Nevada. [28]

[Endorsed]: Original. No. 1576. United States District Court, District of Nevada. James Cunningham, Plaintiff, vs. Keane Wonder Mining Company, Defendant. Writ of Error. Filed July 24th, 1914. G. J. Edwards, Clerk. [28½]

*In the District Court of the United States in and for
the District of Nevada.*

No. 1576.

JAMES CUNNINGHAM,

Plaintiff,

vs.

KEANE WONDER MINING COMPANY, a Cor-
poration,

Defendant.

Assignments of Error.

Now comes Keane Wonder Mining Company, a corporation, defendant in above named, and in connection with its petition for a writ of error in this cause, makes and files the following assignments of error upon which it will rely in the prosecution of its writ of error in the above-entitled cause and upon which it relies to reverse the judgment entered herein as appears of record:

I. The Court erred in granting plaintiff's motion to strike out the third defense of defendant's answer to plaintiff's amended complaint, in that, by so doing, this defendant was and is deprived of the defense generally known as assumption of risk, which was and is a valid and legal defense under and by virtue of the laws of the State of Nevada, but which is not a defense under the Roseberry Employers' Liability Act of the State of California, under and by virtue of which the above-named plaintiff prosecuted this action.

II. The Court erred in denying defendant's mo-

tion to dismiss said action for the reason that under the law of comity the above-entitled court will not and should not entertain jurisdiction of this action of damages for alleged injury to plaintiff while in the employ of defendant in the State of California, in that the said statute of the said State of California, under which this action was and is prosecuted, to wit, Roseberry Employers' Liability Act, Cal. Stat., 1911, is contrary to the law and public policy of the State of Nevada upon the same subject.

III. The Court erred in denying defendant's motion for a directed verdict in its favor or a nonsuit, for the reason that it affirmatively appears that this action is based upon a statute of the State of California, known as "Roseberry Employers' Liability Act, Cal. Stat., 1911," [29] for an alleged injury to plaintiff resulting from accident occurring on or about the 9th day of December, 1911, in Inyo County, State of California, and that said Act was and is contrary to the public policy of the laws of the State of Nevada upon the same subject, and that therefore the Courts of the United States should not and will not, under the law of comity, permit such an action to be prosecuted in this court. That this Court, therefore, has no jurisdiction of the subject matter of the action.

IV. The Court erred in denying defendant's motion for a directed verdict in its behalf or a nonsuit for the reason that it appears from the evidence that the property and the place of the business conducted and carried on by this defendant, Keane Wonder Mining Company, is in Inyo County, California, and

that this defendant at the time of said accident, resulting in alleged injuries to plaintiff, was and ever since has been exclusively engaged in business in the State of California, and has never removed from that State into the State of Nevada. That it therefore affirmatively appears that plaintiff could have prosecuted his action in the State of California, the place where he received his alleged injury, and that if judgment was recovered in said State it could be enforced under the laws of the State of California, it affirmatively appearing that the Keane Wonder Mining Company, owned no property in the State of Nevada out of which any judgment recovered in any court in said State could be satisfied or discharged to any degree whatever.

V. The Court erred in denying defendant's motion for a directed verdict in its behalf or a nonsuit, for the reason that the evidence in this case utterly fails to establish any negligence on the part of this defendant, resulting in or contributing to the alleged injuries of plaintiff.

VI. The Court erred in denying defendant's motion for a directed verdict in its behalf or a nonsuit, for the reason that there is no evidence in the case, introduced either by plaintiff or defendant, from which the jury could lawfully find that the said alleged injuries to plaintiff were sustained by him within the State of California, while engaged in the line of his duties or the course of his employment, by reason of the want of ordinary or reasonable care of this defendant or of any officer, agent or [30] servant of this defendant.

VII. The Court erred in denying defendant's motion for a directed verdict in its favor at the conclusion of all the evidence in the case for the reason that it affirmatively appears that this action is based upon a statute of the State of California, known as "Roseberry Employers' Liability Act, Cal. Stat., 1911," for an alleged injury to plaintiff resulting from accident occurring on or about the 9th day of December, 1911, in Inyo County, State of California, and that said Act was and is contrary to the public policy of the laws of the State of Nevada upon the same subject, and that therefore the courts of the United States should not and will not, under the laws of comity, permit such an action to be prosecuted in this Court. That this Court, therefore, has no jurisdiction of the subject matter of the action.

VIII. The Court erred in denying defendant's motion for a directed verdict in its favor at the conclusion of all the evidence in the case for the reason that under the law of comity, the above-entitled court will not and should not entertain jurisdiction of this action of damages for alleged injury to plaintiff while in the employ of defendant in the State of California, in that the said statute of the said State of California, under which this action was and is prosecuted, to wit, Roseberry Employers' Liability Act, Cal. Stat., 1911, is contrary to the law and public policy of the State of Nevada upon the same subject.

IX. The Court erred in denying defendant's motion for a directed verdict in its favor at the conclusion of all the evidence in the case for the reason that the evidence utterly fails to establish any negli-

gence resulting in or contributing to the alleged injuries of the plaintiff.

X. The Court erred in denying defendant's motion for a directed verdict at the conclusion of all the evidence in the case for the reason that there is no evidence that the alleged injuries to plaintiff were sustained by him within the State of California while engaged in the line of his duties or in the course of his employment, by reason of the want or ordinary or reasonable care of this defendant or of any officer, agent or servant of this defendant, and that, in particular, there is no evidence: [31]

a. Of any breach of a statutory duty;

b. Of any complaint by the plaintiff before said alleged accident that defendant's mine was unsafe or dangerous.

c. Of any knowledge on the part of defendant of a dangerous or unsafe condition of the mine or that the roof thereof was dangerous or was liable to fall;

d. Of any request by plaintiff or any other person that the roof of said mine be made safe;

e. Of any refusal or neglect by this defendant to make the roof of said mine safe after request made by plaintiff or any other person;

f. Or affirmative proof that even if defendant had made a more extended examination of the roof of said mine that the alleged defect might have been or would have been discovered by it;

g. Or affirmative proof that there was any loose rock or ore on the roof of said mine as alleged in said amended complaint;

h. Or affirmative proof of assurances by defend-

ant to plaintiff as to the safety of the place where plaintiff was injured after objections thereto made by plaintiff to defendant;

i. Or affirmative proof that appliances used by defendant were insufficient or inadequate;

j. Or affirmative proof that any of defendant's employees were incompetent;

k. Or affirmative proof of any lack of supervision on the part of defendant;

l. Or affirmative proof that defendant failed to make proper tests to determine the safety of the roof of said mine;

m. Or affirmative proof that defendant did not do its full duty in making the said mine a safe place for plaintiff to work;

n. That injury to plaintiff resulted from any failure of defendant to warn him of any danger known to or which should have been known to this defendant;

o. Or affirmative proof that an extra pillar was needed or that any [32] extra stulls or supports were needed at the place where the roof of the mine caved, or that defendant knew that any such were needed; nor is there any affirmative proof of any reason or cause which would or should have put defendant on notice that such pillars or stulls or supports were needed;

p. Or affirmative proof that had defendant placed the usual and customary stull or support at place where the roof of the mine caved that such stull or other support would have prevented the caving;

q. Or affirmative proof that any pillar in said

mine was removed which should have been allowed to remain;

r. Or affirmative proof from any witness that any rock in said mine was loose and was known or should have been known to defendant prior to the time of the accident; and there is no evidence to show that defendant had any cause to know that any rock in said mine was loose and liable to fall, to the possible injury of any of its employees, nor is there any proof that this defendant had any reason from any cause so to believe.

XI. The Court erred in instructing the jury as follows:

“The injury complained of occurred in the State of California, consequently we are governed by the law of that commonwealth in the particulars which I shall indicate. Formerly in California it was the law that the employee assumes the ordinary risks of his employment, and that he could not recover if he were himself guilty of contributory negligence, which negligence directly caused or contributed to cause the injury, or if the injury was the result of the negligence of a fellow servant. This has been changed by the statute of that state. Now in any action to recover damages for personal injury sustained in California by an employee while engaged in the line of his duty or in the course of his employment, on the ground of the want of ordinary or reasonable care of the employer, or of any officer, agent, or servant of the employer, it shall not be a defense that the em-

ployee, either expressly or impliedly, assumed the risk or the hazard complained of, or that the injury was caused in whole or in part by the want of ordinary or reasonable care of a fellow servant.

Furthermore, the fact that such employee himself may have been guilty of contributory negligence, shall not bar a recovery therein, where his contributory negligence was slight and that of the employer was gross in comparison, but the damages may be diminished by the jury in proportion to the amount of negligence attributable to such employee.

If you find from the evidence that said injury to plaintiff resulted from contributory negligence on the part of the plaintiff, and that no negligence is proven or established on the part of the defendant, or that the negligence on the part of the defendant, if any, is not gross in comparison with the negligence established on the part of the plaintiff, then I instruct you that if the plaintiff is guilty of contributory negligence which is more than slight negligence, he cannot recover."

in that said instructions in effect authorized the jury to find a verdict in favor of plaintiff under a law of the State of California which was and is contrary to the law and public policy of the State of Nevada upon the [33] same subject, and in that said instruction was and is an erroneous instruction as to the said law of the State of California, on the subject of contributory negligence, and under the facts of this case

is an erroneous instruction of the law as to assumption of risk applicable thereto.

XII. That said Court was without jurisdiction to enter judgment or any judgment in said cause against the defendant, Keane Wonder Mining Company.

XIII. That the said judgment so entered on the verdict of the said jury was contrary to and is against law, for the reason that there is no evidence that said alleged injuries to plaintiff resulted to him by reason of the want of ordinary or reasonable care of this defendant or of any officer, agent or servant of this defendant.

XIV. That the said judgment so entered on the verdict of the said jury was contrary to and is against law because the undisputed evidence in the case conclusively establishes that the plaintiff was guilty of contributory negligence which resulted in his alleged injuries, and in this behalf that the undisputed facts in the case conclusively establish that the contributory negligence on the part of plaintiff was not slight and that of the employer was gross in comparison. On the contrary, if there was any negligence established in the case on the part of plaintiff and defendant, that such negligence on the part of each was ordinary negligence and was not slight and gross by comparison but was equal.

XV. The Court erred in denying defendant's motion for new trial on March 14, 1914, for the following reasons:

a. That the evidence in the case is wholly insufficient to justify the verdict of the jury or to sustain

a judgment entered thereon;

b. That said verdict and said judgment were and are against law;

c. That the verdict of the said jury in favor of plaintiff in the sum of Twelve Thousand Five Hundred (\$12,500) Dollars, was and is excessive damages appearing to and which were given by the jury under the influence of passion or prejudice; [34]

d. That the denial by said Court of defendant's motion for new trial, if discretionary, was and is an abuse of discretion.

Wherefore said Keane Wonder Mining Company, a corporation, plaintiff in error herein, prays that the judgment of said court be reversed.

Dated July —, 1914.

B. M. AIKINS,

SWEENEY & MOREHOUSE,

A. H. JARMAN,

Attorneys for Plaintiff in Error, Keane Wonder Mining Company.

GAVIN McNAB,

Of Counsel.

[Indorsed]: No. 1576. United States District Court, District of Nevada. James Cunningham, Plaintiff, vs. Keane Wonder Mining Company, a Corporation, Defendant. Assignments of Error. Filed July 24th, 1914. T. J. Edwards, Clerk. Sweeney & Morehouse. B. M. Aikins. A. H. Jarman, Attorneys for Defendant. [35]

[Bill of Exceptions.]

*In the District Court of the United States, in and
for the District of Nevada.*

No. 1576.

JAMES CUNNINGHAM,

Plaintiff,

vs.

KEANE WONDER MINING COMPANY, a Cor-
poration,

Defendant.

Bill of Exceptions to be used by defendant on its Motion for New Trial of the above-entitled action, and on any Writ of Error hereafter allowed to the United States Circuit Court of Appeals for the Ninth Circuit, to review the Judgment heretofore entered herein.

Be it remembered that on the 19th day of November, 1913, at 1:30 o'clock P. M. of that day, at a stated term of the District Court of the United States, in and for the District of Nevada, the above-entitled case came on for trial, before the Honorable E. S. Farrington, District Judge, presiding, plaintiff being represented by Messrs. Dixon & Miller, and the defendant being represented by Sweeney & Morehouse and A. H. Jarman. A jury was duly impaneled, and the following proceedings had:

The jury, after being sworn, is excused until Thursday, November 20th, 1913, at 10 o'clock A. M., and the Motion of Strike out parts of the Answer is argued by the respective counsel.

Mr. DIXON.—I will read the motion to strike.

(Reads motion.) In case this motion is allowed, we will not press our other motion to amend the reply. That motion is simply in case we are not entitled to have the paragraph in the answer stricken out.

Mr. MOREHOUSE.—If your Honor please, as I understand the law applicable to the Federal Courts, this court will take judicial notice of the statute of California. Probably it might be well for plaintiff to plead it, but if they desire to use the statute of California, I understand the rule to be that the Federal Courts will take judicial notice of the statute.

An action has been brought here under a statute of California, and if counsel are not going to insist upon their own motion, one of the grounds [36] upon which I shall make a motion will not arise at this time, but will necessarily arise during the course of the trial.

Assuming that the motion to amend the reply is to be presented, and is now presented to the Court, I would be in a position to raise the questions that I desire to raise; and they are: First, that the Court has no jurisdiction to proceed with the trial of this cause under the statute of the State of California, for the reason that the statute is in conflict with the public policy of the State of Nevada; and, second, that the statute of the State of California is not compulsory, but is a matter of the election, either of the employee or the employer, as to whether they will come under the provisions of this statute, and that they cannot select one provision of a statute, unless the entire statute be reviewed by the Court. The averment that the employer has failed to elect to come

under the provisions of this act, at this very moment destroys the right of the prosecution of this action; and therefore the court should refuse to permit the prosecution: First, under the law of comity, and secondly, for the reason that it will appear by the pleadings in this reply that the act does not apply to the cause of action, or attempted cause of action, set forth in plaintiff's complaint.

The COURT.—The motion to strike the third defense from the amended answer on page 9 of that document, will be granted. The motion to amend the reply I will not rule on at present.

Mr. MOREHOUSE.—I understand your Honor has not passed on the question that the action cannot be prosecuted under this statute; that the Court would have no jurisdiction of this action by reason of the allowance—if it is allowed—of the amendment to the reply, on the ground that the employer was not under the provisions of this act?

The COURT.—I have not passed on that yet.

Mr. MOREHOUSE.—I do not know whether this is the proper time to make a further motion that we wish to make, because it is quite important in determining the method by which we shall proceed, if we are ruled against.

The COURT.—You can state your motion, cite the authorities, and go right on with the case. I think I understand the point, and it is merely [37] a question of what the law is, and involves an examination of some authorities.

Mr. MOREHOUSE.—If your Honor please, we move that this cause of action be dismissed upon the

theory that under the law of comity, your Honor will not entertain jurisdiction for the reason that the action being brought under a specific statute of the State of California, that such statute is contrary to the law and public policy of the State of Nevada.

It is averred in the complaint that the defendant is a resident and maintained offices, and so forth, in the State of Nevada at the time of the bringing of this action, and at the time that the accident occurred, During the course of the trial, we will present proof to show that the defendant has never in the last six or seven years had any offices or headquarters in the State of Nevada. We have denied that allegation specifically in the complaint, and we will ask to have the testimony offered on that point during the course of the trial, submitted with the motion.

The COURT.—Very well.

Mr. MOREHOUSE.—And further, that there is no reason set forth in the complaint why the parties should leave the *lex loci*, which is the forum of California, and come into this court, and ask this court, as the *lex fori*, to apply the doctrine in this case.

The COURT.—This case was brought in the State court, and removed here by you?

Mr. MOREHOUSE.—Yes, your Honor. I would ask, if your Honor please, to save an exception to the ruling striking out the third defense.

The COURT.—The exception will be noted. You may proceed.

(The pleadings are read to the jury by respective counsel, and the opening statement on behalf of plaintiff is made by Mr. Miller.)

**[Testimony of James Cunningham, in His Own
Behalf.]**

Mr. JAMES CUNNINGHAM, the plaintiff, called as a witness in his own behalf, testified as follows:

Direct Examination by Mr. MILLER.

My name is James Cunningham. I reside in Goldfield, State of Nevada. For the last number of years I have been working quite a little in the [38] mines, as a mucker. I first started in to work in the mines the latter part of 1906, but I have done some other work as well. I was born in 1881. In the month of December, 1911, I was mining at the Keane Wonder Mine. At that time that mine was operated by the Keane Wonder Mining Company, the defendant in this action. I went to work for the Keane Wonder Mining Company some time about the 9th of October, 1911.

On the 9th day of December, 1911, I went on shift at half-past seven in the morning. My shift was to be until half-past four in the afternoon. The work which I began to do on that day was mucking. I entered the mine by means of a tunnel. I first started in to work at a pillar, shovelling into a chute there; shovelling rock into the chute. The place where I was working is called a stope. There were about twenty-two men working in that stope.

Mr. MILLER.—If the Court please, I have here a drawing of a portion of that mine, including the tunnel and the stope referred to, and I desire to have the witness mark upon this map certain posi-

(Testimony of James Cunningham.)

tions for the purpose of illustrating the evidence.

The COURT.—“Do you propose to offer it in evidence?”

Mr. MILLER.—“I am not certain as to that, your Honor. At this time I want to have these positions marked for the purpose of illustrating the evidence, and use it for that purpose, but I am not certain as to its introduction.”

Mr. MOREHOUSE.—“If counsel wants to use it as a method of illustrating, just like something he would draw himself, of course I cannot have any objection to it, and I presume it is perfectly legitimate, but if it is for the purpose of showing this is an accurate description of the underground workings, pillars, stopes and trackage, of course I shall object to it, if it is offered as evidence.”

The COURT.—“Then it cannot be admitted as evidence until it is offered, and its accuracy is testified to; otherwise I understand there is no objection. It is not in evidence.”

Mr. MILLER.—Q. “Mr. Cunningham, I show you this map, and ask you what it purports to represent?

A. It represents the stope we were at work in.”

[39]

The COURT.—“Now, gentlemen, this is going into the record, and under the ruling, the map or paper itself does not go in, the testimony cannot be explained. It seems to me if the witness is going to testify with reference to that, it had better be admitted in evidence, with the restrictions already suggested, that it can be used for the purposes of illus-

(Testimony of James Cunningham.)

tration, but not for the purposes to which you have objected, otherwise the testimony will not be very clear in the record."

Mr. MOREHOUSE.—"I have no objection to that. If plaintiff wishes to show it as a memorandum, illustrative of his testimony, to that I have no objection; but if counsel proposes to introduce it in evidence later on, as anything accurate on which he can base an argument to the jury, if it is a fact that the jury is to be guided by, then I object to it."

The COURT.—"Then it may be admitted simply as illustrative memoranda, is that the idea?"

Mr. MOREHOUSE.—"That is it, exactly."

The COURT.—"The order can be made in that way, that it is illustrative of the witness' testimony, but not in any manner as showing the condition of things."

Mr. MILLER.—"Not as an official map."

Mr. MILLER.—"Let it be admitted and marked under the restrictions so stated by counsel, for the purposes indicated, and afterwards if we are able to show it is an accurate map, we can make an offer of it for other purposes."

Mr. MOREHOUSE.—"That is satisfactory."

(Map marked plaintiff's Exhibit No. 1.)

Mr. MILLER.—"Mark with the figure one, Mr. Cunningham, the point on the stope where you were injured—just the figure one at the place where you were injured. (Witness marks on map.) Have you that marked? A. Yes."

I worked, shovelling rock from the pillar, for

(Testimony of James Cunningham.)

about an hour at the place where I started to work on the morning of the 9th of December.

Mr. MILLER.—Q. “At what point in the stope did you begin work the morning of the 9th of December— You may mark that with the figure 2?”
[40]

(Witness marks the point on the map as directed.)

After that the foreman, Mr. Roper, put me to work where I was hurt, and I put in a switch there. We finished putting in the switch near noon, when Mr. Roper, the foreman, said he was going to the Whip Saw, and left me working there, with instructions to put in a set of rails when there was room.

I worked shovelling into a car, until about ten minutes of four, and I was just throwing a shovelful into the car, and I was caught here (indicating), and knocked over a little bit, and was just caught in that position—just tipped over—and to the left of me the rock kept falling down, and it raised up six or seven feet; then it rolled down on my left side, so from this side I was covered up, from about here (showing); and I heard Mr. Porter then hollering over on the other side there; he was about here (indicating on map), and there were three or four Mexicans there, and two or three Italians, started taking Mr. Porter out, and they couldn't get him out; then these Mexicans came and took me out; and when they rolled the rocks off me they found this leg broked—smashed; I put my hands down, one on each side, and held it that way (illustrating), until I was carried to the mill. It was a slab of ore,—a slab of rock,

(Testimony of James Cunningham.)

which struck me, which came from the roof. The roof was about from sixteen to twenty feet above my head. Approximately seventy ton of rock fell.

Q. "Had you worked in this part of the mine before that day? A. In that part of the mine?"

Q. Yes, in the stope—had you worked in that stope before the 9th of December?

A. Yes, that is the only place I ever worked, in that stope."

I don't remember just where I was working on the 8th of December. I did not work at the particular place where I was injured, theretofore.

Q. "You were shovelling rock, you say, into the car; was that rock or ore, or what kind of material was it? A. It was ore.

"Q. It was ore? A. Yes."

The ore which I was shovelling was broken down by machine, a shift or two before that; some of it maybe there a week. The vein or ore-body varies from twenty to sixty feet; that is a flat or [41] blanket vein. The thickness of the ore at the particular place where I was injured, from the footwall to the hanging-wall, was close to twenty-five feet, or more. The ore or rock that fell on me, fell from the top over my head. There were no ore bodies anywhere near me, aside from the rock in the top—the ore in the top above my head. The distance between the place where I went to work first on the 9th of December, and the place where I was injured, was about fifty or sixty feet. I cannot say exactly in what direction the place where I was injured was,

(Testimony of James Cunningham.)

from the place where I went to work.

Q. "How or in what manner, if at all, was the roof of that stope supported?

A. It wasn't supported by anything.

Mr. MOREHOUSE.—Q. You say it was not supported? A. No, sir.

"Mr. MILLER.—Q. At the place where you were injured, indicated on this map by the figure one, was there any timbering? A. No, sir.

Q. At the place where you were injured were there any means whatever in use at that time to keep the rock on the top of the stope from falling?

A. No, sir.

Mr. MILLER.—Q. When you filled your car in so mucking, what did you do with the car, if anything?

A. When I filled the car?

Q. Yes, if you got a car loaded, mucking, what did you do with it, if anything?

A. Ran it to the chute, and dumped it in the chute. The chute was approximately thirty feet from the place where I was injured. The name of the foreman at that time was George Roper. Roper directed me to work at the particular point where I was injured. He said to go ahead and work here, and when you get room for a set of rails, put them down. Mr. Roper was there with me that morning for two or three hours.

Mr. MILLER.—Q. "What instructions did Mr. Roper give you as to the ore you were mucking?

A. He said when you get the switch in, he says go ahead and work here, and when you get room for

(Testimony of James Cunningham.)

a set of rails, put them down; that is all he said."

The work of shovelling ore into the car was included in the instructions given me by Mr. Roper. We used a candle for light. Three or four candles would do one for a shift of eight hours. I had one candle burning at the time that I was injured.

Q. Did you make any examination, Mr. Cunningham, of the roof of that [42] stope, or the place where you were injured, before you were injured?

A. No, sir.

Q. You said it was about sixteen feet above your head, the roof; were there any means there by which you could have reached the roof to examine it?

A. No, sir, not that I seen.

Q. Did Mr. Roper make any examination of that roof that morning while he was in there? A. No.

The COURT.—Q. "You say there were no means to make any examination?

A. Not that I seen."

Referring to the tunnel which I entered to go to work, and the stope, the tunnel is higher than the stope. The way we used to go to work when they were running that tunnel, over to where there was a stairway and ladder, and go down five or six feet, and then the stope was a kind of a grade to it, you know; it wasn't just altogether level, so that I could not say the distance. I never received any instructions, other than those I have already testified to, as to the work that morning.

Mr. Keith was the superintendent at that time. He never gave me any general instructions, rules or

(Testimony of James Cunningham.)

regulations as to my work in the mine, and I never saw any instructions, rules, or regulations printed or stuck up any place.

Mr. Keith was in the mine on the 9th of December, in the forenoon. I had no conversation with him. My partner, Mr. Perez, was working ten or twelve feet from me at the time I was injured. There were also three or four Mexicans working close. Yes, Mr. Guerra was there.

“Q. You have stated something about Mr. Porter, where was Mr. Porter?

A. Well, he was working on the machine there in the stope.

Q. Where was he at the time of this injury which you received?

A. Oh, he was about twelve or fifteen feet from me.”

They got me out of the rock, and took me to the mill, which was about a mile and a quarter from the mine. They carried me out of the stope—by the same way that we went to work in the mine, up the ladder-way, and out the tunnel. My leg was broken.

“Q. Did you receive any other injuries by reason of that fall of rock? A. At that time?

Q. Yes, were there any other injuries on your body of any kind?

A. At that time this arm (indicating left arm) was paralyzed from the blow, and there was several scratches all over my body; this other leg here was hurt pretty bad here on the outside, outside of my leg [43] and my back was hurt.”

(Testimony of James Cunningham.)

After they got us to the mill they put us into a house there, and sent to Rhyolite for the doctor. I remained in the mill until 5 o'clock the next morning, when Doctor Wheeler came, from Goldfield, and I was taken to Goldfield, by automobile. Doctor Wheeler and some man that was with Doctor Wheeler, accompanied me. After they got me to Goldfield they operated on me,—Doctor Wheeler and Doctor Dunham. This operation was performed at St. Mary's Hospital. I believe that I was in St. Mary's Hospital in Goldfield for about eight months and five days. At the time that I was injured I felt pretty bad; I could find my leg as I was holding it, I could find the bone splintered, and it was almost broke off, and I felt pretty bad. This did occasion pain. I was suffering pain pretty bad for a month.

I never got the better of the effect of the injury. This leg now, it is terrible pain, right at the break here, like rheumatism; and it is pretty bad sometimes for two or three days; and when I am walking with it, walking down a hill, sometimes my knee is a little weak, or something, and bends forward, and I have to push it back. And I am nervous; I tried to work last summer, and I had to quit. I worked two shifts and one hour. I quit because my leg swelled up, and got so sore; I was helping a blacksmith, and my back hurt me, and I had to quit the job. Since the 9th day of December, 1911, up to-day, I have worked two shifts and one hour. I am not able to work.

In 1906 I started in first to work in the mine. Before 1906 I was firing boilers in Rock Springs, Wyo-

(Testimony of James Cunningham.)

ming. I have not done any work except that of common laborer. I have not got very much of an education. I know no other trade aside from what I have testified. For my labor as mucker I receiver four dollars a shift, from the Keane Wonder Mining Company. After I got out of St. Mary's Hospital in Goldfield I rented a house, and am still living there, in Goldfield. Doctor Wheeler has attended me as a physician. Several times I bought medicine, that I saw advertised for rheumatism,—for this pain that is here. Doctor Wheeler took care of me while I was in the hospital, and the nurses there. No one has taken care of me since I left the hospital. I can't just tell you now how much [44] money I have paid out for medicine or care on account of this injury. I am paying eight dollars a month for the house I have rented; and I bought medicines, and bandages. I do owe money on account of these injuries; I owe money in the restaurant in Goldfield; and this man that I had the cabin rented of, he said that he would not ask anything of me until I would be able to pay it. I owe nothing for doctors or nurses, or hospital, so far as I know. I don't know whether Doctor Wheeler was paid for his services or not; he told me he wasn't. I didn't pay him anything. Doctor Wheeler attended me all the time I was in the hospital, and after I left the hospital for a couple of weeks.

“A. Well, it has worried me quite a lot this thing, how I am going to make a living, or what is going to happen; and I am nervous, feel nervous, can't sleep

(Testimony of James Cunningham.)

at night, nobody is going to hire a cripple and I feel pretty bad."

There has been a change in my general health since the injury; I feel nervous and weak all the time, and have lost about sixteen pounds. Before the injury I was in good health, and was physically strong.

Cross-examination by Mr. MOREHOUSE.

I was born in eighteen and eighty-one. I was born in Ireland. I first came to Nevada in 1906. I worked on a farm in Ireland. I left Ireland in 1903. I reached New York first, and remained there about a month, during which time I didn't do anything. After that I went to Rock Springs, Wyoming, on a railroad train. I paid my own fare. I was in Rock Springs three years. I was shovelling coal, and working in a boiler room for about a year, and I was firing boiler there for about two years. From Rock Springs I went to Tonopah. I was back and forth there several times; I don't remember just how long I was there. I went to work for the Tonopah Extension as a mucker, in the latter part of 1906. It was a deep mine, underground. I worked there about three months, as a mucker, and running car. There were drilling machines around where I was working. There were several men around the machine. I did not work under one of these men. I was under a foreman, who gave me instructions. I knew what I had to do. In mucking I used a pick and shovel, and a hammer. I had no bar for determining by drumming, the points where I was working. I [45] used the hammer for breaking boulders, breaking the

(Testimony of James Cunningham.)

rock before it was put into the car.

“Q. Was that mine timbered?

“A. Yes, sir, it was timbered.

“Q. What examination would you make of the surface of the drift?”

“A. I never would make any.”

The surface of the drift—from the floor of the drift, was around six feet. I never made any examinations of the surface of the drift. I had no means of determining the character of the roof of the drift, or the sides of the drift, or the floor of the drift, or of determining the solidity of the rock, or necessity of timbering. After I worked there about three months I came to Goldfield. The first place I went to work was at the Mohawk. It was a shaft mine. I was mucking in the Mohawk mine, sometimes in a stope, but mostly in the drifts. I would fill my car, and run it over to the cage, and it would be brought up by a cage, in that mine. I don't remember the depth of the first level in the Mohawk. There were many other people working there on the same shift. I went to work in—I am not sure whether it was January or February, and I worked till that panic came on. By the panic I mean the time that the men were paid in scrip. It was several months. During that time I acted as a mucker in the mine, under a foreman or shiftboss.

“Q. Do you know what drumming is in a mine?

A. No.

Q. And all this time you have been working as a mucker in a mine in Tonopah, and in a mine in Gold-

(Testimony of James Cunningham.)

field, you never heard of such a thing as drumming?

A. Drumming? No." I never heard that word before. I had no instructions,—only simply to gather up the muck, put it in the car, run down the car-line to the cage. That was the work.

"Q. And to do that you were given a pick and shovel and sometimes a hammer when you had to break the boulders? A. Yes."

"Q. No other instruments at all were given you?"

"A. No, sir." I stayed around Tonopah. I didn't do any work for eight or ten months. The mines were running in Tonopah, but there were so many idle men in the country you couldn't get anything to do. I think the first work I did after we were laid off at the Mohawk was at Tecopa, worked on a railroad grade, about three months or so. I went from [46] there to the Johnnie Mine, in Nevada. I was top-man there. It was an incline shaft. I worked there three or four months. Then I went to Park City, Utah, and worked there firing boilers, for about a year. Then I went back to Tonopah, where I went to work on the Mizpah, mucking. I worked there from January to the latter part of July, 1911. I used a pick and shovel, and a hammer. I had no bars for the purpose of finding out what the surface of the stope or the drift was, whether it was solid or compact, dangerous or not dangerous. I had no instructions of that kind in that mine. My instructions were simply to take up the muck and put it into a car, and run it out to the cage and let it be taken up to the surface. I was under a foreman during all

(Testimony of James Cunningham.)

this time. I left Tonopah about the first of September, and went down to the Borax Mine, and couldn't get any work there, and went from there to Skidoo, and couldn't get anything to do there, and I went from that to Keane Wonder. I believe it was about the 9th of October, 1911, when I went to work at the Keane Wonder Mine. Mr. George Roper employed me, he was the foreman of the mine.

"Q. And he employed you at \$4.00 a day?"

"A. Yes."

"Q. What did Mr. Roper tell you when he employed you?"

"A. He asked me if I was a miner when I asked him for a job and I told him no. Well, he says, 'I will give you a job mucking.' I told Mr. Roper I was a mucker."

I got the pick and shovel, and went in there and went to work. He hired me to go to work. He went with me and showed me the place to start in. I didn't notice what work had been done in the mine where I went to work on the 9th day of October, 1911. There had been men working there. There had been stoping.

"Q. Were there any pillars in there? A. Yes.

Q. Was there any timbering in there?

A. Yes, there was a few stulls in the stope.

Q. A few stulls,—no square-sets, or anything of that sort? A. No, sir.

Q. And was the stope a large or a small stope?

A. Oh, it was a pretty large stope.

Q. Was there more than one stope?

(Testimony of James Cunningham.)

A. I only know of one."

When I went to work I started in where the boss showed me. I didn't look around the stope to see what was done, or anything else. It was in [47] a stope.

"Q. Was it a large stope or small stope?

A. A pretty large stope.

Q. Was the roof of the stope protected by pillars or by timbers? A. No, sir.

Q. It wasn't protected at all?

A. Not where I was working.

Q. How large was the stope where you went to work that was not protected, either by pillars or timbers?

A. Well, there is a few pillars in the stope, and a few stulls.

Q. Then there were some pillars in the stope?

A. Yes.

Q. What are the pillars?

A. Part of the ore left.

Q. Part of the ore left? A. Yes.

Q. And what is it left for?

A. It is left to protect the mine.

Q. To protect the mine. It stands there then a solid body of ore or earth, to hold up the roof of the stope, doesn't it? A. That is what it is left for.

Q. And where there is one left there is no use for any timbers, is there?

A. Oh, yes, you have got to timber it.

Q. Always—do you always have to timber it?

A. It all depends on how wide them pillars is.

(Testimony of James Cunningham.)

Q. Precisely, and the width of the stope?

A. And the width of the stope."

Mr. MOREHOUSE.—Q. "Do you remember, Mr. Cunningham, how many pillars there were at the point where you were hurt on December 9th, I think it was, 1911?

A. Well, there was some pillars there quite a distance away from one side, and I was close to a pillar on another side."

"Q. Pretty well worked out—were you working all the time against the face of the ore body?"

"A. But we were working several places all over the stope."

"Q. I understand, but you were always working in an ore body, were you not?"

"A. Sometimes at a pillar."

"Q. What is that?"

"A. Sometimes they took ore from a pillar."

Q. At the time you were hurt, the work was on the face of the ore body?

A. Yes. We would leave several pillars all over the stope there.

Q. Well, let me illustrate that, if I can. Let me take this line here; you can see that line from where you are, the line drawn like that? (Referring to map placed on board by counsel for defendant. Defts. Ex. —.)

(Witness looks at map.) It don't look like the stope I was in at all. I don't know what level; I only worked on the one level. I would go in from a tunnel on a hillside to get in on the level where I was work-

(Testimony of James Cunningham.)

ing. Then I would go [48] in a portion of territory that had already been worked out, and turn to the left to get in to where I was at work, and down a ladder into the stope. The ladder was five or six feet long. Whereabouts is that level on there?

“Q. I don’t know. If your Honor please, may I have Mr. Wilson explain the whole map, that is, the points of it, at this time. Have you any objection?”

Mr. MILLER.—“For the purpose of locating the entrance tunnel, the incline shaft, the ladder which the witness has referred to, and the point where the plaintiff was hurt, I make no objection.”

Mr. MOREHOUSE.—Q. “Now, Mr. Cunningham, did you get an idea of that map? You don’t understand this map at all then, to the north of the hillside? A. No.”

I don’t understand this number 4 tunnel as the entrance that I would go into the place where I was working; I don’t understand this is the point where a little ladder let down to this point below, constituting the workings of this map; I don’t understand it. I know who made this map. (Referring to Plaintiff’s Exhibit No. 1.) It was Mr. Keith’s helper, on the 11th and 12th of December, 1911, helping to survey the stope. I understand this map thoroughly. The name of Mr. Keith’s helper is Lezerivch.

“Q. Now, he represented to you that the next day after you had been hurt that he was in this mine with Mr. Keith, and Mr. Keith was making a map or survey of the mine at that time? A. Yes, sir.

(Testimony of James Cunningham.)

Q. Did he also represent to you that Mr. Wilson and Mr. Keith were together making that map?

A. Well, he didn't mention Mr. Wilson; he said Mr. Keith and himself.

Q. And they had surveying instruments, and made proper measurements? A. Yes, sir.

Q. And he just drew this out from memory—or did he draw it from data which he had in his possession?

A. Well, there is a part of it—oh, he just drew it out as a sketch map.

Q. Just drew it as a sketch map? A. Yes.

Q. When did you get this map?

A. About four or five months ago."

Yes, there is a car-track on this map. These are marks representing [49] car-tracks. (Indicating on Plaintiff's Exhibit 1.) The blue lines represent air-pipes; and the dark bodies represent ore bodies or pillars, and the vacant white represents worked out properties. I was working where this figure 1 is. This little red line here represents the switch that I put in under the instructions of Mr. Roper. Mr. Roper helped me to put in the switch; then my partner and me put in a set of rails, at the end of the switch. That figure 3 represents the switch where we put in the rails. And this red line running over here to what is marked "Chute" was the car-line over which we ran our cars to dump into the chute. Mr. Porter was working here. (Indicating on map.) (The point indicated by the witness is marked "5" on the map.) I was working that day down here in the first part of the shift; I was working here at this

(Testimony of James Cunningham.)

pillar running into this chute; and Mr. Roper came along and took me over here to put in this switch, and that is where the cave was where I got hurt. Yes, the cave was here at this switch.

Mr. MOREHOUSE.—Q. “This point where you have the figure 1 is where the rock fell from the roof of the stope onto you?”

A. Yes, sir, it took in quite—it took in all that in there, it covered the switch.

Q. It covered the switch? A. Yes.

Q. And who was working with you there at that time, if anyone?

A. This man who is here, Mr. Perez.”

The car was about there on the track (indicating on map), and he was over there on the other side of the track, and there was a machine up in here. The machine was where that green line is run. (Point marked “6” on map.) About seventy tons of rock fell. I don’t remember just how many pounds there are in a ton. I don’t know how many cubic feet there are in a ton of ore. The cars we were using on the track would not hold a ton.

“Q. So when you say seventy tons, that is a mere matter of guess? A. That is all.”

I was working between the switch and the track, and the point where the figure 1 is on this map.

“Q. Do these things at all represent the outline of the ore bodies?”

A. Yes, it looks to me—it looks like the stope looked at that time.”

I went into the mine through a tunnel. This place

(Testimony of James Cunningham.)

on the map represents [50] the tunnel that you enter from the hillside. Then you came along to a certain point, and would go down a little stairway, four or five feet. The stairway would be here (indicating on map). (Point is marked 7 on Plaintiff's Exhibit No. 1.)

“Q. Then wasn't all this territory in here worked out, except here and there a pillar standing to hold the roof?

A. Well, at that time that was about all the ore there was in that stope.

Q. That was about all the ore there was in that stope? A. Yes.”

I went and turned to the left, and down here, and came over this open cut here, is the way I went to work that morning, and right down here to this pillar—started in shovelling in that chute.

“Q. You know there were pillars in that mine?

A. Yes.

Q. You know what they were left there for?

A. They were left there to protect the mine.

Q. They were left there to protect the mine, and to protect the roof of the mine? A. Yes.

Q. And to prevent the falling of the roof onto the floor of the stope? A. Yes.

Q. Now, I understood you to say yesterday the height of this stope was what?

A. Well, it ran all the way from twenty to sixty feet, I believe.

Q. The height of the stope from the floor to the roof? A. Yes.

(Testimony of James Cunningham.)

Q. You are just guessing at that, are you not?

A. Just guessing.

Q. In fact, the location of all this, is a mere matter of guess with you?

A. That looks awful like the stope.

Q. I understand it looks like it, but in reality it is all guesswork?

A. It is a sketch map of the stope. This man that gave me this told me from this point here (indicating), till a point on this chute there, was eighty feet; from where I was to the same point on the chute, was fifty-six feet. The day I was hurt there were three machines working in the stope. There was one with Porter; that is marked as number 5. Here is another one called Mack, marked on the map as number 6. The third one was here, at the end of this track. (Indicating on map.) (Point marked "8".) Those three places represent the three machines.

"Q. When the machine works and the blast is shot in the evening—on the night shift—the day mucker takes away the muck that has been thrown [51] down by means of the machines, and the discharge of the dynamite on the night shift?

A. Yes, sir.

Q. And the men then who work on the day shift—that is, the machine-men—and the blast that is thrown in the day, the material is taken up by the mucker who goes in there on the night shift?

A. Yes, they have been doing it, I think.

Q. Now, the reason for that, Mr. Cunningham, is

(Testimony of James Cunningham.)

the fact that a good deal of smoke will gather immediately after the firing of the shot, and then you have to wait some little time to find out whether the jar of the explosion has loosened the rock, and whether it would be dangerous to go to that point, and therefore you wait some considerable time before the mucker goes to the point where the rock has been thrown down?

A. Well, the miner goes in first and bars down the loose rock, and he tells the mucker when it is safe for him to come in.

Q. Now, then, when you went in there who was the miner where you went to work mucking?

A. That ground that fell down, I think it was hanging there for about four days.

Q. Hanging there for about four days?

A. Yes, sir.

Q. What do you mean by hanging four days?

A. It was hanging up to the hanging-wall there; it was four days from the last miner had worked there.

Q. And did you observe it when you went in?

A. No, I didn't pay no attention to it.

Q. You didn't look at it at all to see whether it was loose or not? A. No, sir."

Mr. Roper took me in there to work, and I thought it was all right; Mr. Roper said nothing to me at all. Me and him put in the switch.

"Q. You and he put in that switch. What do you mean by saying four days; do you mean to say that the roof of the stope had been loose four days, or do

(Testimony of James Cunningham.)

you mean to say that the blast which had been fired in that particular stope was four days prior to the time you went in?

A. I mean to say that the blast had been four days.

Q. That is all; you know nothing, and heard nothing and saw nothing that would indicate that the roof of the stope there was loose at all?

A. No, sir.

Q. Now that which fell down was a loose sheet wasn't it—it didn't fall down in separate little particles, but was just one solid sheet that fell from the top or roof of the stope?

A. Well, it fell so sudden I could not tell what way." [52]

My partner would be about ten or twelve feet from me, the car was atween me and him. He was not hurt at all. Mr. Porter was passing by, right about there somewhere. (Indicating on map.) Closer over to the pillar somewhere. (Indicating.) (The place indicated by the witness is marked with the figure "9" on Plaintiff's Exhibit No. 1). He was at that point when he was injured. Me and him was hurt. At the time that we were hurt Mr. Porter was about twelve or fourteen feet from me.

At Rock Springs I worked pretty near three years; I got three dollars a day when I was firing boilers; out of that I paid my own board and lodging. I worked pretty near all that time.

"I received \$5.00 a day in Goldfield mucking, and received \$4.00 a day in the Tonopah mines."

In the Keane Wonder Mine I received four dol-

(Testimony of James Cunningham.)

lars per day. Our board was taken out of that. They had their own boarding-house. There is no means otherwise for a man to stop, except to be lodged and boarded at the mine, being no town, and away off by itself.

“Q. Now, when you worked all these years, were you in perfect health?”

“A. Yes, sir.” “And was a strong active man of good habits and willing to work at any time when I could find employment. I tried once to work since I was hurt in the Keane Wonder.”

I worked two shifts and one hour. That is the only time that I have made any effort since I was hurt, to get employment. I have been sick, not feeling good all the time, and I didn't look for any other occupations; I thought it was impossible for me to get any work.

“Q. Now, the bones where you were injured, in this compound fracture, as testified to by your surgeon, have knitted solid and compact to-day?”

A. I don't know. Yes, I can walk. I don't know just how much my left leg is short. I tried to have a shoe fixed with a heavy sole and tall heel,—I can walk better without it.

In the working of the stope where I was at work, there was three machine-men there, and Frank Porter, and another man they called Old Mack. The miners were the machine-men. I don't remember the other one's name. The [53] miner that ran a machine would drill the holes and put in the dynamite and attach the fuse. After he had

(Testimony of James Cunningham.)

done that he would holler fire, and all get out of the stope. Before he fired the dynamite what would he do. He would remove his machine back to a place of safety.

Q. After he fired the shot what became of the miner? A. They all got to a safe place.

Q. But it was the duty of the mucker to muck it out for a place to put the machine back, wasn't it?

A. Oh, just as the thing would happen; whatever orders the foreman would give would be done.

Q. Then that blast would take place then. If that was in the night shift, the morning shift of muckers would go down and remove the muck before any machine was placed in there again?

A. Well, if it would happen that way; the foreman would send a miner there first to bore down the loose rock, and inspect the roof.

Q. He would send a miner—who do you mean by miner?

A. Some one hired as a miner, and working as a machine-man, some one that was using powder. "Sometimes it would not take long to get the machine back there and the machine-man could make the place himself for to put his machine; just throw a little dirt out of the way and get his machine in there."

Q. But the machine had to be blocked up, certain hose had to be attached to the machine for air or force, so the muck had all to be taken out before he could put his machine back?

A. No, he could have that hose on there, and the

(Testimony of James Cunningham.)

machine in there, and the muck there too.

Q. And the muck there too? A. Yes.

Q. Without removing it at all?

A. Just remove enough for to leave room for to get his machine in.

Q. He would have to go over the muck to get his machine in?

A. Yes, he would have to go over the muck.

Q. Was it not the usual custom for the mucker to go in and clean all the muck out before the machine is put back there at all?

A. No, it ain't.

Q. Well, wasn't that the custom at the Keane Wonder mine?

A. Not always that I know of.

“Q. Who were you working for, behind what machine were you working as mucker?

A. “I wasn't for any machine in particular. I was closer to Old Mack than I was to anyone else on that day.”

Q. Well, the night shift was cleaning away the muck that had been created by the machine of the [54] day shift?

A. Not always; when them four men would go on shift, the foreman would go there with them, either that, or he would send a miner, and sometimes he would bore down that loose rock himself and see that the place was what he thought safe, before we would go in there to work. That is what they were doing. That is what they did in all other mines that I worked in.

(Testimony of James Cunningham.)

I had no conversation with anybody about whether it was safe or not to work there. When the foreman sent me in there I thought it was all right. No one told me anything about it, one way or another. Mr. Roper worked with me in putting down this switch. The nearest machine was Old Mack,—about fifteen feet from me. At the time the top of the roof of the stope fell down I was just throwing a shovelful of dirt into the car. I was working loading a car.

“Q. Were there any candles at that mine other than what you miners carried with you?”

“A. No, sir, not that I know of.”

“Q. There wasn’t a string of candles put in at any point there down the line? “A. No, sir.”

“A. I was caught so quick there was no chance to get away; it just fell like a flash of lightning.

Q. You were standing up at the time?

A. I was just throwing a shovelful of rock in the car.

Q. Did you have any warning, or hear any noise, or know anything about it, until it occurred?

A. No, sir.

Q. During the time that you were working there, did you ever make any request for any timbers, or anything to be done by your employers in the way of protecting the mine? A. No, sir.”

“Q. You never saw anything that would require you to make any such request, did you?

“A. Well, the man that is mucking—the foreman would not ask him about anything and he would not

(Testimony of James Cunningham.)

listen if you would tell him anyhow." I didn't notice whether any injury was done to the car that I was throwing ore into. I was about three or four feet from the car. I don't know how many pillars were left to protect the roof.

"Q. Do you know the distance from any one pillar to another pillar?

A. Well, I could give an opinion.

Q. Well, do so. A. In places—

Q. Well, I mean at the point where the actual caving took place.

A. Well, from that to the pillar across on the other side, it would be about sixty [55] feet." And then from where the chute was up to where Mr. Porter was working, it would be about eighty feet. Some pillars was bigger than others.

"Well, I said that pillar from where I was hurt over to the pillar on the opposite side, about sixty feet; that wasn't a round pillar; it was a long pillar; it would be about fifteen feet long, and I don't know what the length would be."

That pillar, not being exactly round, was fifteen feet one way, and the distance through the other way would be about six or seven feet.

MR. MOREHOUSE.—Q. "Well, now, I will ask you plainly, isn't it a fact that there were three pillars, and that this caving took place so that it fell down between these three pillars, which were very close together?

A. Oh, it is quite a distance between them pillars."

(Testimony of James Cunningham.)

Where Mack was working it was a block of ground, constituting a pillar in itself. I was hurt pretty close to where Mack was; I was about fifteen feet from where he was. There was a block of unworked ground where Mack was working with the machine; all of that unworked ground was a pillar.

Q. And it held the entire roof up, because there was nothing until that was worked out, that would be possible for the roof to fall down?

A. No, it could not fall down, it would be taken down.

Q. It could not fall down until you had taken the ore body out? A. No.

Q. At the point where you were hurt the ore body had been taken out, hadn't it?

A. There was five or six feet of ore sticking up to the hanging-wall.

“Q. Yes, five or six feet of ore sticking up to the hanging-wall?”

“A. Yes, five or six feet of ore sticking up to the hanging-wall?”

“Q. But where you were standing throwing rock into the car was all worked out?”

“A. It could not have been worked out, Mack was working there close with that machine. It was worked out where I was standing except for the ore sticking up to the hanging-wall.”

Q. Now that was worked out at that point, and at that point were there not three pillars, very near by.

A. No, not that I know of. There was a pillar close to where Mr. Porter was.

(Testimony of James Cunningham.)

“Q. Now, from that point where Mack was working, how far was it to the first pillar nearest to you, which had been left in the territory that had been worked out?

A. It would be ten or twelve feet.

Q. Now, then, [56] that pillar would be how far away from where Mack was working?

A. Oh, it would be over twenty feet, I guess.”

From where Mack was working to the first pillar from him would be twenty feet, and from that pillar to me would be ten or twelve feet; there was a pillar about sixty feet away from it.

“Q. Weren’t there three near by, not over fifteen or twenty feet apart, running in a sort of a triangle from one point to the other, in the three pillars?

A. Not the way it looks to me.

Q. Well, I don’t care how it looks to you, I want to know whether it is a fact or not?

A. Well, I am stating to you as clear as I can what I know.

Q. Do you really know very much about this underground place where you were at work?

A. No, I don’t.

“Where old Mack was working was a long pillar and it was caving down all the time. They sometimes put a Waugh machine on there and would break ore from these pillars.”

This man that I don’t know his name now whether he worked that day on a pillar or not, I don’t know, but he was working the day before on it, and broke some ore out of the pillar.

(Testimony of James Cunningham.)

The COURT.—“Q. Do you mean to say that five or six feet was the ore above you that fell down?”

“A. Yes, your Honor.”

At the point where I was hurt, I think the stope would be about twenty-five feet, from wall to wall. I never measured it or saw it measured. You could see ore in the top of the stope.

“The ledge is almost perpendicular—the hanging-wall right above your head. The ore that fell down was five or six feet of ore that wasn’t taken down from the hanging wall.”

Redirect Examination by Mr. MILLER.

The ore at the point on the hanging-wall, over where I was working at the time I was injured, was a kind of quartz—the color I could not just describe to you. It was a kind of a gray colored quartz. The schist hanging-wall was a dark color; you could easy see it was waste, though.

“By perpendicular vein I mean a flat vein with a hanging-wall being the roof of the stope.” [57]

“Q. Calling your attention to this map, Mr. Cunningham, and the figure 6, where you have stated the machine-man Mack was working; and the figure 9, where you say Mr. Porter was at the time of the falling of the rock, will you indicate which is the pillar you stated was about sixty feet away?”

A. This one, I believe. (Indicating on Plaintiff’s Exhibit No. 1.)

Q. I will make that 10. (Marking point on map.)

Q. Will you indicate on here the pillar which you

(Testimony of James Cunningham.)

described as being about fifteen feet long, and six or seven feet wide?

A. That would be this pillar.

Q. That is the one you mean by the figure 10?

A. Yes, sir.

Q. Now, there is a figure 2 on this map, indicating the place where you were mucking in the morning of December 9th? A. Yes.

Q. That was on this same pillar, number 10?

A. On the same pillar.

Q. Calling your attention to the map, and the marks here with the word "Chute," I will ask you if that was the chute into which you were shovelling ore in the morning of December 9th. A. Yes, sir.

Mr. MILLER.—I will mark that number 11. (Marks the point on Plaintiff's Exhibit No. 1.)

Q. Calling your attention to this other mark, and the word "Chute," I will ask you if that was the chute into which you were running the cars in the afternoon? A. Yes, sir.

Q. That I will mark 12. (Marking point on map.) I will ask you to state, Mr. Cunningham, whether there was any pillar at all between the place where you were injured and the pillar marked number 10, where you mucked in the morning?

A. No, there was no pillar.

Q. I will ask you to state whether there were any stulls or timbers to support the hanging-wall of the stope between the place where you were injured, and the place where you were mucking in the morning.

A. No timber outside the chute—they two chutes.

(Testimony of James Cunningham.)

Q. None except the chute?

A. None except the chute.

Q. Did the timbers of the chute reach to the hanging-wall? A. Yes.

Q. Mr. Cunningham, you have stated that the stope was a good deal larger than this room, will you state approximately how large that whole stope is, or was at that time?

A. Well, to walk right around it as it is there, I think it would be about six hundred feet." [58]

Recross-examination by Mr. MOREHOUSE.

Q. "I understand you to say, Mr. Cunningham, that between the pillar where you were at work, or near where you were at work, and the chute, there were no other pillars?

A. I didn't understand that.

Q. That is, the chute timbers ran clean up to the hanging-wall? A. Yes.

Q. How long were those chute timbers, do you know?

A. Well, where the chutes was they would be—oh, I think about ten feet.

Q. About ten feet. That is all."

Mr. MILLER.—Q. "Do you know, Mr. Cunningham, where the top of that chute was, whether the top of the chute was at the hanging-wall on that level, or whether it ran up to another level—do you know? A. No."

Mr. JAMES CUNNINGHAM, recalled for further direct examination, by Mr. MILLER testified as follows:

(Testimony of James Cunningham.)

The property of the Keane Wonder Mining Company is out of Rhyolite; it was known as the Keane Wonder Mine, in Rhyolite, Nevada. It was about eighteen miles by the trail; and I believe it was twenty-six from the road, from Rhyolite.

“Q. Do you know of any other property of the Keane Wonder Mining Company besides the Keane Wonder Mine?

A. Yes, they got real estate in Goldfield, in the name of the Keane Wonder Mining Company.

Q. What State? A. State of Nevada.

Cross-examination by Mr. JARMAN.

Mr. JARMAN.—Q. “Mr. Cunningham, where is the company’s property where you were at work, in what state is it situated?

A. It is in California.

Q. Inyo County, California, is it not?

A. Yes, sir.

Q. Do you know that since the time of your injury the Company has continued its operations at the same place?

A. Well, I expect it has.

Q. You know as a fact, do you not, that they are still working at that mine at the present moment?

A. Yes, sir.”

[Testimony of Dr. E. A. Wheeler, for Plaintiff.]

Dr. E. A. WHEELER, called as a witness on behalf of plaintiff, after being sworn, testified as follows:

(Testimony of Dr. E. A. Wheeler.)

Direct Examination by Mr. MILLER.

My name is E. A. Wheeler. I reside in Goldfield, Nevada.

(It is [59] stipulated by and between the attorneys that Doctor Wheeler is a practicing physician and surgeon, regularly licensed to practice in the State of Nevada, and competent in his profession.)

I know James Cunningham, the plaintiff in this case. I first became acquainted with him on December 9th, 1911. He was injured at the Keane Wonder Mine, in Inyo County, California; I was called down from Goldfield, left the evening before, and got down there about 4 o'clock in the morning. He was lying in a bunk-house, and had a compound fracture of the lower left leg, above the ankle. There were contusions over his body—he was bruised up considerably. I attended him professionally at that time. We put him in an automobile and took him to Goldfield, and operated on him the next afternoon, the afternoon of the 10th. The operation was sawing off the crushed bones and wiring them together—shortening the leg about an inch and a half. There were four operations on the leg within the next two or three months. The second operation was removing some shattered bone. I don't remember the exact date. It was within two or three months, anyway. The third operation was something of the same nature, and also the fourth. The leg was not shortened any more by reason of these subsequent operations. I attended him professionally for about a year, from the 10th of December, 1911, to the first

(Testimony of Dr. E. A. Wheeler.)

of the year, 1913. I gave Mr. Cunningham no other than general treatment in the hospital in a case of that sort where a man is run down, as he naturally would be,—other than as I have testified. There was a great deal of suppuration,—the leg was crushed to a pulp. “He had a very serious time and the bones were all crushed out and very few muscles were left, the wound was very dirty and it had had very little attention. I dressed it as best I could—wrapped the leg and strapped him in the automobile and took him to the hospital. I have been paid \$100 on account for my services.” My services were worth a thousand dollars. A man injured as Mr. Cunningham was, would suffer pain, to a very great extent, for several months. I did notice indications of suffering in Mr. Cunningham, loss of flesh, and indications of pain, requiring something to relieve the pain, so he could get some [60] rest. “Those cases are very painful usually.”

Cross-examination by Mr. MOREHOUSE.

I should say that the last time I saw Mr. Cunningham, professionally, was about a year from the time he was injured. At that time the wounds were healed up, and he was able to walk on the leg. He was in as good condition as I thought he would be at any time. That is, he was able to do a fair amount of work; I don't think he was able to work in the mine, do the heavy work around a mine—he was not totally disabled. There will be some disability; he will have to wear a thick shoe, something to lengthen the leg, and he will not be able to do as much work

(Testimony of Dr. E. A. Wheeler.)

as he would have been otherwise, because of the shortening of the leg.

I went to the Keane Wonder Mine at the request of Mr. Wilson, the superintendent and manager of the mine. I was requested to take Mr. Cunningham to Goldfield, and do what I thought best, and the bills would be paid. This request came from both Mr. Keith and Mr. Wilson. "Both bones were crushed and a part of the bone protruded through the flesh causing an open wound. I was assisted in the operation by Doctor Dunham and Doctor Turner." Keane Wonder Mining Company paid my assistants. St. Mary's Hospital is first-class; the services are satisfactory, and he was given every care that would be given to anybody. This was done at the request of the Keane Wonder Mining Company.

"Q. Now, the plaintiff here is not wholly disabled from engaging in any occupation, is he? A. No."

There are classes of occupations which, if he saw fit to seek and should obtain, he could perform. There were no internal injuries, or anything that would go to his general health in the future.

"Q. Is there anything in this injury which will go to his general health in the future? A. I don't think so.

"Q. You think not? A. No."

[Testimony of Matt Dropulich, for Plaintiff.]

Mr. MATT DROPULICH, called as a witness on behalf of plaintiff, after being sworn testified as follows: [61]

(Testimony of Matt Dropulich.)

Direct Examination by Mr. MILLER.

My name is Matt Dropulich. I reside in Goldfield, State of Nevada. I have been a miner for about five years. I am a mucker and miner; I am called a timberman, too. I have done no other work in a mine. I first began to work in a mine in Park City, Utah. Then I went to Goldfield, Nevada,—Consolidated Company, Claremont Shaft. I done mucking there. Next I took in Keane Wonder Mine. I don't remember what time of year I began work there. I don't remember the year. The first time I worked there I worked eleven shifts. I was mucking there too. I worked there a second time, about three months, mucking. I worked in Mason, in the Blue Stone Mine, mucking, and helping timberman. I was working next time to the Goldfield, in the Grizzly Bear Shaft. I was mucking and running a machine, and do sometimes timberman too. I was running a machine drill, on drift and stope, and rest too, all kinds of work with machine there. I was not working in the Keane Wonder Mine at the time this man was hurt, I was in Rhyolite the day he got hurt. I was working in the Keane Wonder Mine about ten days before this fellow got hurt. I worked there afterwards,—about a month afterwards. I worked in the stope where the men were hurt, before and after. The space between the floor of the stope and the roof is about from fifteen to twenty foot.

Mr. MILLER.—Q. “How was the roof of that stope supported, if you know?”

A. Well, the roof, I want to tell you that place

(Testimony of Matt Dropulich.)

ain't exactly—I can't tell you whether the roof was solid or soft or loose, I can't tell you that exactly.

Q. Well, was there anything to support the roof, to keep it from falling? A. You mean timbers?

Q. Yes, or anything else?

A. What I can remember, I didn't see timbers in that stope; I cannot remember, I would not tell you exactly about that.

Q. Was there anything else there to support the roof at that point?

A. There was some kind of pillars." Foreman, what you call Mr. Roper, every morning he come to you and tell you place what you got to do, and muck in; then after you have that lot mucked, then he tell you another place to go, and then into another place. I never saw any printed rules posted up anywhere. [62]

"Q. Do you know what a sounding bar is?

A. Those pinch-bars what you got to pick the roof, you mean?

Q. Yes.

A. That is not a mucker's business; that is a miner's business; I never was work with that, I didn't see it either."

"I went back to the Keane Wonder Mine a day after these fellows got hurt."

Cross-examination by Mr. MOREHOUSE.

After dynamite has been dicharged, then the mucker goes down there to take away the rock or ore, whatever it is, that is broken down.

{Testimony of Matt Dropulich.}

“Q. Well, now, see if I can make it plain to you. I will suppose I am running the machine, and drilling the holes in the wall, or drift, or whatever it may be, and I have put in the shots—I go away, don’t I?

A. Sure.

Q. And after those shots have been fired, who, of the people that work in the mine go in there first, after the firing of those shots?

A. Miner—miner goes the other place.”

Miner got to go to the place and see if there is any loose rock. Mucker goes after; mucker have no right to pick it down; it is all the miner’s business. Muckers have no business to take a pinch-bar and strike the surface, and find out whether the rock is loose, after the firing of a shot; mucker’s business is to muck him out; that is all what he has got to do. He goes in and cleans it all up, so after he has cleaned it up and hauled it away, the machine may be put up against the face of the drift to drill other holes.

“Q. Now, you say the first workman that goes into the mine after the shots have been fired is a miner?

A. Miner—work all together; miners come first to the place, the other place.

Q. What does the miner do then?

A. Oh, he take a pick, or something, machine or something just to rap the roof to see whether it is loose or not.

Q. That is all a miner does in the mine?

A. When he go to the place, the other place, then, to see whether loose or not, and then drill them out.”

Mucker got no business at all except mucking, that is all. A mucker is given a pick and shovel and

(Testimony of Matt Dropulich.)

hammer to break boulders sometimes.

I can't tell you what level it was where this man was hurt. I can't tell how many levels there are in that mine. I don't know whether this [63] is the first, second, third, fourth, or fifth level, I was working all the time on one level. I didn't ask nobody what level I was working on. I went in the next day after this man was hurt; I saw that the roof had fallen down. Three men mucked one day, and didn't get out what fell down; I don't say whether it is there yet or not. There were muckers there taking this out where it fell down from the roof.

"Q. What was it fell down from the roof?

A. Ore.

Q. Ore? A. Yes."

There were some pillars, but not very much pillars. I know Mr. Porter. He was mining there, he was running the machine. I was mucking behind Mr. Porter when he was working there; he was working in a stope at that time. Porter was a machine-man. Working up against the face of that wall or drift, there would be a machine, and this machine would bore holes into the face, and those would be filled with dynamite. And then later a fuse would be fired, and that would break and explode, and break down the rock. Then the mucker came in and removed all the rock. That was his business. All along in this stope there was a track for running cars, and some place none. This car-track ran away down here to the chute.

"Q. This chute was an upraise from a lower level,

(Testimony of Matt Dropulich.)

wasn't it? A. Something like that.

Q. And then the car would run out to this chute, and the mucker would run his car out there, and tip it, and let the rock out of the car fall down this chute to another level . . . the ore went to another level?

A. Why, sure.

When that ore reached the other level it was carried along a drift to the rock-crusher. From the rock-crusher it ran over a tram-way to the mill.

There was a switch where Mr. Cunningham was working where he was hurt. The work was all on this side of the track.

“Q. A long time before it was all worked out, and nothing standing there but the pillars, was the only ore there, and they were not working in any of those pillars?

A. Those pillars, nobody was working there that time.”

I never worked on the other side of the track. I saw fellows work on the other side of the track. I know the point where the top of the stope [64] fell down on the floor of the stope, but I can't tell you anything about the map. I can't tell you all that,—about men working in the place where the mine had been worked out, and there was nothing but pillars standing. Oh, some fellows was working the other side the track sometimes. I see some fellows, but I can't tell you, because I don't know which side you mean. I understand what flat mean.

Mr. MOREHOUSE.—Q. “I will put the map on and use it at present as a diagram; later on I shall

(Testimony of Matt Dropulich.)

prove the map, and introduce it." (The map is placed upon the board).

Mr. MILLER.—"Are you going to introduce that map in evidence?"

Mr. MOREHOUSE.—"I shall later, when I have proved the map; I am going to use it with this witness for the purpose of illustration; later on I am going to prove the map.

Q. Can you see from there this line drawn along here? A. Yes, I can see.

Q. Now, when you were working in the mine—do you understand that at all, this map?

A. No, I can't tell you nothing about the map.

Q. Well, we intend this line that we have drawn here—you see how this is curved around in this shape—to indicate the face of the drift where you were drilling against, and mucking from in that mine—do you understand that?

A. No, I didn't understand that.

Q. We have drawn this line along here to represent the railway track, and this is to represent a switch; do you understand that.

A. No, I can't understand that.

Q. You can't understand it at all?

A. I can't understand the map at all."

"Q. There were several stopes there on this level, were there? A. Yes.

Q. Every man you know of working in these stopes was working on the ore-body? A. Yes.

Q. In the particular stope I speak of, where you were at work, where Mr. Cunningham had been at

(Testimony of Matt Dropulich.)

work, and where Mr. Porter had been at work, you were all working on the ore-body?

A. I know the place where Cunningham and Porter was working, but that time they got hurt I was not there.

Q. You know the place where they had been at work?

A. I know the place, but I can't tell you by the map.

Q. You know the place where they were working—they were working on ore?

A. Mr. [65] Cunningham was working in the ore-body; Mr. Porter, I don't know whether working in the ore or not." I have been mucking altogether, about five years.

"Q. You understand mucking thoroughly now, don't you? A. Well, I understand mucking, yes.

Q. Very well, I will put it that way.

A. I understand that all right.

Q. Then you understand mucking very well. While you were working underground did you ever learn anything about mining?

A. Learn any about what?

Q. About mining; do you know anything about mining?

A. I know anything about work, but I don't know anything about mine.

Q. You would know a mine, I suppose, if you saw it, would you? A. If I saw it?

Q. Yes, if you saw a mine you would know it?

A. Well, nobody could know. You see that posi-

(Testimony of Matt Dropulich.)

tion is pretty hard to tell, if it is a lot loose you would know something, but if it is a little loose nobody would know."

"Q. Do you know ore when you see it from waste?

A. Why, sure."

"Q. I am talking about the Keane Wonder mine?

A. He was ore.

Q. And we are not going to take up any other mine now for the present. You know where the ore body was in the Keane Wonder Mine, where you were at work? A. Where I was working he was ore.

Q. Now, do you know whether the ore was on both sides of the track over which you ran your car, or not?

A. Oh, I can't tell you everything where I was working; I got everything that was ore where I was running car.

Q. Did you work on both sides of the track, or on one side?

A. I was working both sides of track, but I don't know which one you mean.

Q. How many tracks are there in that?

A. Oh, I can't tell you that.

Q. Now, there was only one track that you were using, was there?

A. Oh, I was working more than one, sir.

Mr. MOREHOUSE.—Well, I give it up. I give it up that he don't know anything."

Redirect Examination.

Mr. MILLER.—Q. "Mr. Dropulich, you stated in answer to Senator Morehouse that there were some

(Testimony of Matt Dropulich.)

pillars in the stopes—pillars of ore supporting the roof?

A. He was some pillars, yes; pillars of ore, yes; I am sure that way, but I can't tell you how many pillars there was. [66]

Q. Now, did you ever work on any of those pillars, muck from them?

A. You mean close to pillars?

Q. No, on the pillars themselves; did you ever muck from the machine man who had shot the pillars? A. Yes, I do."

"Q. Now, this track we have been talking about in that stope there, it runs in various directions, doesn't it—it is not straight, is it?

A. Oh, some places crooked, some places it straight."

Mr. MOREHOUSE.—"Q. When you worked in the Goldfield Consolidated, in the Claremont Shaft, what tools were given you to work with?"

A. Shovel and pick and cars, and hammer."

"Q. Anything else?" "A. Nothing else."

Recross-examination by Mr. MOREHOUSE.

"A. On the Grizzly Bear I was working about seven months running a machine there, mucking, helping timberman sometimes.

Q. You ran a machine on the Grizzly Bear?

A. Yes.

Q. And you were mucking also in the Grizzly Bear, did you say? A. Yes, I was mucking there too.

Q. Were you ever furnished with a bar for the purpose of drumming?

(Testimony of Matt Dropulich.)

A. You see on the Grizzly Bear the ledge is not very big; you no need bar; if you see some loose, you can pick with a pick. Since I was a miner there, I never use a bar there at all, cause this ledge is too short, and you can reach it with your hand to the roof every place."

MATT DROPULICH, recalled by plaintiff for further direct examination, testified as follows:

Mr. MILLER.—"I desire to offer in evidence that part of the California statute which is set up in paragraph four of the complaint; the act relating to liability of employers for injuries or death sustained by their employees, providing for compensation for the accidental injury of the employees, establishing an industrial accident board, making appropriation therefor, defining its powers, and providing for a review of its awards, approved April 8th, 1911, section 1 and section 2 of the act, which read as follows:

The COURT.—"Well, is there any objection?

Mr. JARMAN.—"We object unless they offer the entire act. We have no objection, if counsel will offer in evidence the act in its entirety." [67]

Mr. MILLER.—"We do not admit that any part of the act applies to the case, subsequent to the first three sections."

Mr. MOREHOUSE.—We will want the first seven sections, and section 10 to be reviewed by the Court.

Mr. MILLER.—You can offer that yourself.

Mr. MOREHOUSE.—I may be in error, but I understand that this Court will take judicial notice of the whole act, and I am prepared to present au-

(Testimony of Matt Dropulich.)

thorities that the Federal Court so holds.

Mr. MILLER.—Our contention in that respect is that if a person wants to avail himself of the statute of another State, he must plead it.

(The jury is excused at this time while counsel argue the objection made by defendant to the offer by plaintiff of sections 1 and 2 of the California Statute.)

Mr. MILLER.—For the sake of having the record clear, I would like to have the entry made that the defendant admits that it did not come under the provisions of the Employers' Liability Act.

Mr. MOREHOUSE.—Oh, no.

Mr. MILLER.—Well, state it in your own way.

Mr. JARMAN.—Yes, that is the truth.

Mr. MOREHOUSE.—That we have not given the notice as required by section 5 of the act, and that we have not complied with the Employers' Liability Act of California.

The COURT.—How does this Court know, if it cannot take judicial knowledge of section 5 or if it is not introduced in evidence, how is the Court or jury to know that you are required to come under the provisions of the Act? It seems to me it is utterly unnecessary if only these two sections go in.

Mr. MILLER.—As I understand it, the defense has offered the rest of the Act?

The COURT.—No, the defendant simply says I must consider the act, whether it is offered or not, as I understand it, that I must take judicial knowledge of that, just as I would a statute of this State.

(Testimony of Matt Dropulich.)

Mr. MOREHOUSE.—Exactly.

(Argument.) [68]

Mr. MILLER.—We object further to the admission of these other parts of the Employers' Liability Act, for the reason that they do not apply, to this case in any way whatever, that the first two sections are complete in themselves; and it being admitted that this defendant did not accept the provisions of this act, there can be no application of sections 3, 4 and so forth, to it. We will submit it if your Honor please."

The COURT.—"Well, if I thought there was any question about the matter, I would permit the defendant to amend, and set up these sections, if it wished to do so; but in the absence of any authority on your side, I shall simply follow my first impressions, and take judicial notice of the act; and if before the case is disposed of, anything occurs that leads me to change my opinion, I feel, under the circumstances, the defendant should be permitted to amend, and set up the statute, if it is necessary in order to make out its defense."

Mr. MILLER.—"Then your Honor's ruling is that the whole act goes in?"

The COURT.—"I will simply take judicial notice of it, and if defendant wishes to offer the balance of the act, it may do so, and that portion of it will be admitted which is relevant."

[Testimony of Louis Guerra, for Plaintiff.]

MR. LOUIS GUERRA, called as a witness on behalf of plaintiff, sworn, testified as follows:

Direct Examination by Mr. MILLER.

My name is Louis Guerra. I reside in Goldfield, Esmeralda County, Nevada. I have been working in the mines for eleven years, as a mucker and cageman. In the month of December, 1911, I was working at the Keane Wonder Mine, as a mucker. On the afternoon of the day Mr. Cunningham was injured, I was working about twenty or twenty-five feet from where he was injured. What first called my attention to Mr. Cunningham's being injured was the cave.

"Q. In what position or condition was Mr. Cunningham when you first saw him after the cave?

A. He was covered in rock about up to his knees, lying on his side.

Q. Who helped dig Mr. Cunningham out of the rock, if you know?

A. I did, and my partner." [69]

After Mr. Cunningham was dug out of the rock, I went after water for him where I was working. After that I was digging him out with my partner—caring for him.

"Q. Did Mr. Cunningham give any signs, or say anything, or do anything that indicated that he was suffering any pain at that time?"

"A. He was not speaking."

"Q. What was it that fell and caved on him?"

"A. Waste—mixture of waste and metal."

(Testimony of Louis Guerra.)

About sixty cars of waste—mixture of waste and metal—fell and caved on him, as near as I can tell or estimate it. I had been working maybe two or three days.

“Q. Were there any stulls or timbers supporting the hanging-wall at or near where that rock caved from?” “A. No, sir, there wasn’t.”

I was employed by Mr. Roper.

Cross-examination by Mr. MOREHOUSE.

When Mr. Roper employed me as a mucker, he said it was all right, to go to work. He did not give me any tools, but in the mine I found a pick, shovel and a hammer, also a car to haul out the metal and rock. There was no iron bar. He did not give me any moils, or instruments of that kind. I had only been working there two or three days when this injury to Mr. Cunningham occurred. I had been a miner about eleven or twelve years. I was working in this mine on the 9th of December, 1911, in the stope, I don’t know the number. I didn’t see whether the stopes were numbered in this mine. I do not know what level I was working on. My partner, a Mexican named Jose Vanteos, and I were working about twenty-five feet from where Mr. Cunningham was.

“Q. How many pillars were there near where Mr. Cunningham was hurt? A. Two pillars.

Q. Were they large or small?

A. Oh, regular size.

Q. Regular size. How far from the pillars was Mr. Cunningham Hurt?

(Testimony of Louis Guerra.)

A. About twenty-five or thirty feet.

Q. Was there a car-track near there?

A. A car-track passed in the middle.

Q. That car-track passed in the middle, that is, between the pillars? A. Yes, sir.

Q. Where the waste rock with mineral fell down, was that roof of the stope or hanging-wall protected with pillars?

A. The pillars were there, but they didn't [70] stop the cave."

"Q. How far from the pillars did the cave come down?" A. About twenty-five or thirty feet."

I want you to understand that from the floor of the stope to the roof of the stope was about twenty feet.

"Q. Now, then, I asked the question how far these two pillars that he spoke of were apart from each other, and the answer is about twenty feet apart, I want to know if that is correct?

"A. About twenty-five or thirty feet."

There were only these two pillars. Forty or fifty feet from where I was working there were others.

Q. Now, ask him if he recollects distinctly or not, if there was not right where Mr. Cunningham was injured three pillars running in a sort of a triangle, fifteen or twenty feet apart each of them, instead of two? A. No, sir.

I do not know where the car was that Mr. Cunningham was filling with ore at the time of the accident. I saw a car there.

"Q. So immediately following the accident you

(Testimony of Louis Guerra.)

saw a car, did you, standing on the track?

A. Yes, sir.

Q. How far was that car from the pillar?

A. Ten or twelve feet."

[Testimony of A. Perez, for Plaintiff.]

Mr. A. PEREZ, called as a witness on behalf of plaintiff, after being sworn, testified as follows:

Direct Examination by Mr. MILLER.

My name is A. Perez. I reside in Goldfield for the present. For the present my occupation is a common laborer. In the month of December, 1911, I was working in the Keane Wonder Mine, as a mucker. Before that I had worked in mines at times, not steady, just probably three or four months, and then quit for a while, and come back again. I have been working in mines off and on since 1902. I always worked as a mucker. I had gone to working on the 19th day of September, 1911, in the Keane Wonder Mine and worked there all the time from then up to the time Mr. Cunningham was hurt and after. On the day he was injured, the 9th of December, 1911, I was working in the only stope in the mine.

"Q. How far were you working, how far from where Mr. Cunningham was hurt? [71]

A. Well, supposed to be the length of the track, the length of a rail.

Q. Length of a rail, and that is about how many feet, as near as you can tell?

A. Well, I think that rail was fourteen feet long.

Q. And you were mucking at that time, you say?

(Testimony of A. Perez.)

A. How is that?

Q. What were you doing at that particular time when the rock fell on him?

A. Well, I was shovelling in the car.

Q. Were you between Mr. Cunningham and the chute, or the other side from Mr. Cunningham?

A. No, the other side, Mr. Cunningham was between me and the chute."

What first called my attention to Mr. Cunningham's being injured was a crash which sounded to me like a blast. That concussion put out my light, so I struck another match, lighted a candle, and went a little ways to the clear space, because it was awful dusty there, I could see nothing. The next thing I heard Mr. Cunningham asking for mercy and Porter said he was "Matto." I don't know the meaning of the word "matto."

"A. Then I went and find Mr. Cunningham, something in this position (illustrating), with his legs wedged among rocks.

Q. And what happened after that time?

A. Then another Mexican come along, and we throw out big rocks, and went to helping Mr. Porter.

Q. And what happened then?

A. Then other fellows come around with drills, and we threw off some big rock that was hold Mr. Porter against the pillar."

Well, we took them out of the mine and we met some helper from the surface; then we take cots and took him down to the mill on our shoulders; then Mr.

(Testimony of A. Perez.)

Keith gave orders to clean and wash them, and Mr. Keith or Mr. Wilson brought some clothing from the commissary to put them on; after we got through Mr. Keith picked up two of the bunch and told them to stay there waiting for the auto, and sent the rest of us up to the mine. Mr. Cunningham's leg was broken, one piece of the bone sticking outside.

“Q. And did you notice any other injuries upon his person, of any kind? Why, some kind, like bruises, and red spots around the arms or wrists.

Q. Were there any timbers or stulls supporting the hanging walls at the place, or near where Mr. Cunningham was injured?

A. Well, there were two stulls hanging the *chut* frame, another stull, I think, to the right hand of the switch, a little ways, probably over ten feet, from ten to [72] fifteen feet.

Q. Ten or fifteen feet from where?

A. From the switch.

Q. And the two stulls—

A. (Intg.) And another one, well, about the same distance, from ten to fifteen feet.”

There were no timbers or stulls supporting the hanging wall right at the place where he was injured. I was sent to work at the Keane Wonder Mine by Hummel Brothers Employment Office, Los Angeles, California. When I got to the mine, Mr. Roper send me with another man to work with him. There were no printed rules or regulations stuck up or posted around the mine that I know of. “Mr. Roper gave me no instructions about my work.”

(Testimony of A. Perez.)

Cross-examination by Mr. MOREHOUSE.

I have been a miner and mucker from the 19th of September till the 2d or 3d day of March, 1912. I was in the Keane Wonder Mine from September to March.

“Q. And you were acting mucker as behind what machine?

A. No machine at all; the muck was broke there before we go after the machine.

Q. The muck was already broken before going?

A. Yes.

Q. And you simply went in to remove it?

A. Yes.”

I am familiar with the car-track there and the little switch that ran off from the car-track. Mr. Roper and Mr. Cunningham built this little switch.

“Q. Right at this point, or very near this point where Mr. Roper and Mr. Cunningham laid this little switch, were there any pillars?

A. Well, I suppose that track was shooting between a pillar and a body of ore, after while they cut a pillar there in the far corner.

Q. But I mean at the time that Mr. Cunningham was hurt, wasn't there three pillars, and just between two and the other one, there was a track which ran right in between the pillars at that time?

A. No, there was some pillars, but a little far away.

Q. How far apart were these pillars near the place where the accident occurred?

A. Oh, well, the first pillar was close to the track,

(Testimony of A. Perez.)

and the other pillars were too far away from there.

Q. How far were the other pillars away?

A. Oh, well, I can't say how far.

Q. Well, I know you didn't measure it, but you can give us some idea of the distance.

A. Well, it must be fifty feet, where I was working that [73] morning towards some pillar, close to another pillar.

Q. Now, let me take the nearest pillar to where Mr. Cunningham was at work, how far would that be away?

A. Well, the nearest pillar there was where Mr. Porter got caught.

Q. Where Mr. Porter got caught? A. Yes.

Q. How far was Mr. Porter away from the place where Mr. Cunningham got hurt?

A. Just parallel with the switch.

Q. How?

A. Just parallel with the switch.

Q. I understand it was parallel with the switch, but how far away was it?

A. Well, I don't know exactly how far it was.

Mr. JARMAN.—Give us your best judgment.

A. Well, I am an awful poor guesser about that.

Mr. MOREHOUSE.—Q. Well, was it fifteen feet?

A. Maybe fifteen feet, and maybe more and maybe less.

Q. Now, that would be the first pillar nearest to where Mr. Cunningham was hurt?

A. Yes, that was the nearest.

(Testimony of A. Perez.)

Q. Now, then, how far away would be the next pillar, if you know?

A. Well, there was no more pillars, because they are cut—already cut.”

Q. I am speaking now of those that are cut already.

A. Do you mean backwards, or ahead from us?

Q. Well, I don't know what you mean by backward or ahead. What I am trying to get at is, let us suppose for the sake of argument, that this post is a point where Mr. Cunningham got hurt, how far from Mr. Cunningham was the first pillar, I mean the pillar that was cut out?

A. Well, where I was working in the mine?

Q. I don't know where you were working that morning.

A. About fifty feet distant.

Q. About fifty feet distant was the first pillar to Mr. Cunningham?

A. Yes, that pillar, I think, was the nearest.

“Q. You said something about Mr. Porter being pinned up against a pillar?

A. No, Mr. Porter was caught in the pillar close to the switch where the hanging-wall fell.

Q. How far was that pillar where Mr. Porter was caught from where Mr. Cunningham was hurt?

A. I could not tell exactly.”

That afternoon I had been working in the mine on or about the place where Mr. Cunningham was hurt. Before that I mucked there in straight track, was drifting, something like a drift, all through the stope.

(Testimony of A. Perez.)

I am familiar in the place where I be at work; another part of the stope was worked out for a long time before. [74]

“Q. And they were working along the face of an ore body, were they not?

A. Oh, it was all face there.”

There were three machines working there at that time. Mr. Mack’s machine was the nearest from us, it was just a little ways. All the balance of this stope, except the face of the ore body had been worked out before, that is, to the left hand side of the stope. There was no more hanging-wall working, except at the place where we were working that day.

“Q. There was some hanging ore then on the hanging-wall at the place where you were working that day?

A. Well, there was hanging ore where I work that afternoon.

Q. Where you worked that afternoon?

A. Yes, sir.

Q. And that was how far from where Mr. Cunningham was at work?

A. In the same place.

Q. At the same place. Now, what were you doing when the accident occurred? A. How is that?

Q. What were you doing when the accident occurred to Mr. Cunningham?

A. Oh, I was shovelling in the car.

Q. And what was he doing?

A. Well, he was—when I saw him, he was with his

(Testimony of A. Perez.)

shovel in his hand, some kind of this position, something like that (illustrating).

Q. Well, he was shovelling, too, was he?

A. I guess he was shovelling back of me.

Q. You think he was shovelling back of you?

A. I think he was shovelling there, coarser stuff in the car, and the finer stuff between the ties of the track we lay that afternoon.

Q. He was not working between the irons on the switch, but on the main track itself?

A. He was alongside of the track, I guess.

Q. And he was throwing that into the car?

A. The coarser stuff, he used to shovel in the car, and the finer stuff between the ties, to tamp the ties."

It was the piston machine was breaking ore ahead and this ore would be thrown back from the piston machine and I was taking up this ore and throwing it into the car, to be rolled out to the chute.

After a blast is fired off by the miner or machine-man, if he shoots between half-past seven in the morning and half-past four in the afternoon, then a miner will go back.

"Q. But if he shoots at any other hour, then what does he do? [75]

A. If he shoots at a different time, the night shift will look after it.

Q. What is shooting time?

A. Well, supposing they quit about half-past four, they may shoot probably fifteen minutes after four."

The miner either shoots before or at quitting time.

"Q. If he shoots at quitting time, he goes off shift

(Testimony of A. Perez.)

entirely? A. Yes, sir.

Q. And that muck is left there? A. Yes.

Q. And the next morning he goes in to remove it?

A. Probably the same man.

Q. Probably what man?

A. The same miner that shoot the day before.

Q. A miner is a mucker, is he?

A. He have to go there to see the country.

Q. What would be the use of the mucker, if the miner goes back and mucks himself?

A. I never tell you that.

Q. I know you don't, I am asking you if that is so.

A. The miner goes back to see the country, and if he says it is all right, the mucker go after, and shovel in the car.

Q. The mucker don't go to work until the miner comes and tells him to go?

A. He go at the same time, probably he can do something around till the place is safe to work underneath.

Q. So in all the mines that you have been in, the miner after he has shot, and the muck is lying on the floor of the stope, or whatever you want to call it—

A. (Intg.) No, sir, no such thing. The mucker goes to shovelling some place else."

When I went work as a mucker the first day, just went after and Mr. Roper told me to shovel here.

"Q. Now, what did the miner tell you?

A. Miner?

Q. Yes. A. Nothing.

Q. The foreman is not in there all the time, is he?

(Testimony of A. Perez.)

A. Well, supposed to be.

Q. He is supposed to be in there all the time?

A. Supposed to make his rounds.

Q. I see. This man Roper made his rounds regularly, did he? A. Yes.

Q. And he was foreman? A. Foreman, yes.

Q. Now, during the time you were working in there, did you know of any place where they had not properly protected with pillars or timbers?

A. Well, there were several men working around, one man by the name of Holser—

Q. No, I am not asking you what other men are doing, I am asking you what you saw, yourself?

A. Yes.

Q. Now, wherever they were working, wherever they were mining, wherever they were taking out ore—

A. (Intg.) Several places.

Q. Do you know any place where they were taking out ore that it was not properly timbered or pillared sufficiently to do the work properly and safely?

[76]

A. Well, they were getting ore one, two, three, four, five places.

Q. They were taking out ore at five places?

A. Yes, sir, some of them drilling and some of them mucking at the same time."

Redirect Examination by Mr. MILLER.

I guess the distance between the foot-wall and the hanging-wall at the place where Mr. Cunningham was injured was maybe from fifteen to twenty feet, where

(Testimony of A. Perez.)

the hanging-wall fell. When Mr. Cunningham and I stood there working on the 9th of December, we were standing on loose muck; the foot-wall was on loose muck where the track was laid. The loose muck was lying on the foot-wall and the hanging-wall was above.

“Q. Under whose immediate order was Mr. Porter, the machine-man?

A. No, the machine-man had no orders to give to us at all, because he goes on shift, and he has to drill his rounds.

Q. And then he went off shift?

A. Yes, and then got off shift.”

[Testimony of Frank Porter, for Plaintiff.]

FRANK PORTER, called as a witness on behalf of plaintiff, sworn, testified as follows:

Direct Examination by Mr. MILLER.

I understood what the clerk said. My name is Frank Porter. I live in Goldfield—in Tonopah, both, Nevada. I have been mining four or five years, I think. In that time I have done different kinds of work; I used to do timbering, run machine, and single jack, and things like that, used to do mining by hand. I first began to work in mine in California, copper mine in Shasta County. The first time I was go, I was the mucker; I was car-man, run a car in a drift. I work there about six or seven months, car-man all the time. By a car-man I mean push the car in the drift. Then I went to work in Jackson, California. I did a couple of days' muck and then they put me

(Testimony of Frank Porter.)

tending chuck on a machine. I work three or four months tending chuck, and they give me a piston machine, used to be "baby" machine, they call him some places. I work down there I think couple of months. Then I come up to Blair here. At Blair I was working a machine in the Merry Mine, about a month. Then I go to work about twelve mile from Tonopah for a week, assessment work. Next I go to Mina; there was a mine I work down there, single jack; I think [77] the Silver Star Mine. After that I go to California, stay down there, and then I went to Arizona, where I worked in Gold Road Mine, running a machine. I went to work in the Keane Wonder Mine in 1911 and was working there in December of that year. The first time they give me a job mucker and they say the first chance I give you a job miner, which he did. I run a piston machine. On Dec. 9, 1911, I was working at the same place Mr. Cunningham was hurt. That day I clean one place. Half-past four we go home and I start at half-past seven in the morning. The first work I did that morning, I go to my place where they blast the day before, and after Mr. Roper come up and see what place to set out the machine, he say to go muck, clean him up; he give me Mexican help, and he say when I get through to set up my machine. I work before noon and some after noon to clean out place. I had Mexican to load a car, too. I set up machine.

Q. How long did it take you to set up your machine?

(Testimony of Frank Porter.)

A. Oh, not take long; sometimes he take long and sometimes not.

Q. Mr. Porter, I will show you this map, marked Plaintiff's Exhibit No. 1, and ask you if you can indicate upon that map where you set your machine up on the afternoon of December 9th, 1911—can you tell from that map?

A. Maybe something, not very much.

Q. Well, see what you can do with it. You can indicate the place where you set your machine up the afternoon of December 9th.

A. It looks like to me the machine in this place, because I know where I start. (Indicating on map.)

Q. Looks like what?

A. I was working in drift there, before, I was, and after they take me in the stope. It look like I set my machine up at this place (indicating figure 5 on the map); they was mucking here; and there was a piece of wood, we put it in the wheel cause the car would run too fast, and dump and go in the chute, and we put a stick to stop the wheel of the car, so it would not go too fast, and dump into the chute.

Q. Now, you know about Mr. Cunningham being hurt, do you? A. Yes.

Q. Where were you at the time Mr. Cunningham was hurt?

A. Well, I was just past there. I have to put up my machine, and everything; I try the bolts—the arm has two bolts—and I break one of them bolts, and I come up past here, I see there was a box of tools, a bar, and I go to get one of them and take them back;

(Testimony of Frank Porter.)

and at same time, I don't know, I can't say, [78] it all cave down; it get me, and I don't know what it was; they work like the devil, a bunch of men coming out, car-men and blacksmith, and everybody coming out, and they begin to get me out, and they have to get a bar to get out the big rock.

Q. Now, how far off were you from Mr. Cunningham at the time the rock fell and covered you up—about how far?

A. I can't tell cause a man go right through—here was the car, I can't tell how far I was.

Q. Do you know where the rock fell from?

A. From the roof.

Q. What kind of rock was it that fell?

A. *Metalli.*

A. Well, I know it was ore. I don't know if the waste come down; I know it was ore cause it drill that way—the piston machine it take about six or seven foot, and after, when you get inside, about six or seven or eight foot, use the Waugh machine to knock down the roof. The first thing you get the piston machine set up, and after seven or eight foot high you use the Waugh machine, cause the ore is too high, cause you can't set up your bar if it is too high; can't get a bar set up ten or fifteen or twenty feet, can't get over ten-inch bar to the piston machine.”

You put six inch block under the bar, and six inch on top, and it makes lots of timber, sometimes, not all the time.

“Q. Did you drill any holes after you set your

(Testimony of Frank Porter.)

machine up? A. No, I never drill at all.

Q. Did you drill any holes that day at all?

A. No, I no drill at all that day.

Q. About what was the distance, Mr. Porter, from the foot-wall or floor, or bottom of that stope, to the hanging-wall or top of the stope, from which the rock fell upon you and Mr. Cunningham at that place?

A. About fifteen or twenty feet; I can't tell for sure."

The foreman of the mine at that time was Mr. Roper. He gives me a job.

"Q. Did you ever get any instructions from Mr. Roper or from Mr. Keith about your work?

A. No, they never say nothing to me, just give me a job, that is all."

I never saw any printed rules or regulations or instructions posted or stuck up around there.

"Q. Were there any timbers or stulls to support the hanging-wall at or near the place where Mr. Cunningham and you were hurt?

A. Two timbers [79] over the chute like that (illustrating); we have to have them to timber, 6 by 6, or 8 by 8, square timber, and in that stope there was no timber; in the other place there was some timber. The other place there was some timber, some stull—just put a little plank, two-inch cap on plank that long—it was in the other stope.

Q. Were there any of those stulls in the place where this rock fell?

A. No, there was no stull there at all.

(Testimony of Frank Porter.)

Q. How far from the place where this rock fell was the nearest stull?

A. Well, there was that two timbers in the chute, afterwards the pillar—there was one pillar afterwards—some stull on the other side, some stull where you dump the car.

Q. Then the pillar you refer to was between the chute and the other stull you mean?

A. Yes, there was one pillar after this side—the other side that stope—the other side the other stope there was some timber.

The COURT.—Perhaps you understand it, I don't.

Mr. MILLER.—I think I understand it.

Q. About how far was it from the chute where the two timbers were from the place where the rock fell?

A. Well, there was a piece—

The COURT.—Can you state just how many feet?

Mr. MILLER.—Q. About how far?

A. Oh, I think it was about 35 or 40 feet.

Mr. MOREHOUSE.—That is from the chute timbers to the—

Mr. MILLER.—That is from the place where the rock fell to the chute.

Q. Now, how far was that chute to the pillar that you speak of?

A. I think about sixty feet, something like that.

Q. And how far beyond the pillar were these other timbers in the other stope?

A. Oh, the other timber was about—oh, wide as this room here, and one pillar—put a timber, you

(Testimony of Frank Porter.)

see, some big rock too—one stull.

The COURT.—You had better repeat that, if you understand it.

Mr. MILLER.—Q. See if this is right, Frank. Beyond the pillar to which you refer about as wide as this room, to where timbers were—some timbers—no big rock?

A. Yes, some timber put—some waste.

Q. Did you see Mr. Cunningham after he was hurt? A. No, I could not see him.” [80]

After the rock fell on me they took me down to the mill. I think they took Mr. Cunningham down first; I don’t remember.

“Q. You don’t remember, all right. As a machine-man in that mine, working as you say, under the directions of Mr. Roper, whose duty was it to bar down or pick down or sound the rock after a blast to see whether it was safe, or to make it safe—whose work was it—whose duty was it to do that?

A. Well, I have to do it; it was my place if you see any loose ground.”

No cross-examination.

Saturday, November 22d, 1913.

Court convened, 10 A. M.

[Testimony of Dr. M. R. Walker, for Plaintiff.]

Dr. M. R. WALKER, called as a witness on behalf of plaintiff, sworn, testified as follows:

Direct Examination by Mr. MILLER.

My name is M. R. Walker. I reside at Reno, Nevada. I am a physician and surgeon, duly and

(Testimony of Dr. M. R. Walker.)

regularly licensed to practice medicine and surgery in said State. Have practiced medicine and surgery in this State a little over twelve years. I am President of the State Medical Society, also a member of various organizations and hold offices in them.

I met Mr. Cunningham, the plaintiff in this action, a few days ago. I made a practical examination of him, first by inspection and then by measurements and then by X-ray examination. I made two plates, giving four views, with an X-ray machine. I found upon examination that he had evidently passed through some severe injury, or had received severe injuries in some way; his left leg is badly injured; the lower end of the tibia and fibula had been broken and apparently some part of it had been lost; that is, he had lost a part of the bone. In other words, the left leg is shorter by considerable than the right, and it is also deformed, and the leg in general is somewhat smaller than the right, more than is usual. He had a flat foot, and a stiff ankle in the left leg.

Q. Could you point out, using Mr. Cunningham as an illustration, the bones you refer to, where the part of the bone was taken out; and the condition of the foot and leg?

A. I can refer to the leg. [81]

Q. You can also use your plates, if you wish, Doctor, in connection with your testimony.

(The plaintiff, Mr. Cunningham, removes his shoes and socks, and the witness illustrates his testimony by reference to the feet and legs of the plaintiff.)

A. You will notice here that the right leg has the

(Testimony of Dr. M. R. Walker.)

appearance of the usual normal leg; you will notice that the left leg is considerably different; this deformity is plain to be seen; and this indicates here that he has received a severe injury at some time; from the appearance I take it that it was what is called a compound fracture; that is, that the bones were crushed and broken, and probably broken through the skin; and evidently, from the appearance here, I take it that after the injury, before it healed, there was infection; in other words, suppuration or matter had come out of there. From the measurement that I got here, I take it that he has lost a considerable length of bone in these parts, but that after a time they healed together, and have become a solid part of the leg. In a normal leg there are two bones here in front, the one most prominent is called the tibia, and there is another bone that comes out here, a smaller one, which is not so apparent, called the fibula. Those two bones in this leg were evidently broken, and when they healed, they healed together; that is, instead of being separate, they joined together, and make one now at this bone; there is one solid point, that is, the same as being solid. With this foot, you will notice he has the normal motion of the foot that he should have; you will notice in this foot, if you will hold these two feet up, there is an arch normally to every foot, and in that foot you will notice you don't see the same amount of arch there; in other words, that is what we call a flat foot,—the arch has been broken down; it is hard to get very much motion out of that foot. He has difficulty in

(Testimony of Dr. M. R. Walker.)

getting around; there is some motion, but it is limited, quite limited. Now may I show this at the window? (Referring to X-ray plate.) I have made two pictures; I have made a picture of the normal leg, and of the injured leg. This view (referring to X-ray plate) is taken in what we call an anterior posterior; in other words, is taken from in front to back; that [82] is the view of the normal leg, and that is the condition that the normal leg should be in. Here you see the condition of the leg that has been injured (referring to second plate); it shows up plainly there that these bones are united at this point, and that they have come together in that leg. That is about all there is to be shown; it simply shows the condition we find; but you can see the deformity here, the same as you find there (referring to leg of plaintiff). That gives the normal and the abnormal. I want to show you the other plate, which gives the same view of the same limbs, but instead of being taken anterior posterior that I spoke of, I had his limbs turned over on that side, taking what we call exterior interior; meaning, in other words, from the outside in; the plate is put here on that side and it is taken through in that view (illustrating). Now, this view again indicates the right leg, which is the normal leg, raised over on this side; this plate shows the other leg, showing the injury; you see these united and left a spur hanging out over the side there, contributing to the deformity. That shows you very plainly the condition of the limb as you see it there. In the picture of the left leg, that is a spur

(Testimony of Dr. M. R. Walker.)

of the fibula, the small bone of the leg.

Q. Given a man weighing 188 pounds, in full strength and health before the time of his injury, having been caved on by a rock, and the lower left leg crushed to a pulp, both bones broken, the bone protruding through the skin, and having only first aid, such as washing, and so forth, from four o'clock, the time of the injury, until the next morning, and having one major operation the next day, setting the bone, and three minor operations afterwards, and lying eight months in the hospital, from your examination of Mr. Cunningham at this time, I would ask you to give your professional judgment as to whether or not such injury and such condition would result in any damage or injury to the nervous system of Mr. Cunningham.

A. It would. All injuries of that character will produce what we term medically as a profound shock, physically and mentally, you may say, and embracing the nervous system; so much so that it always results in considerable incapacitating of the individual.
[83]

The COURT.—You may answer the general question as to what will be the results in the future from this injury, as to his capacity to work, and his physical condition.

The WITNESS.—He will be very seriously incapacitated.

Mr. MILLER.—Q. Given the same state of facts as in the former question, based upon your examination of Mr. Cunningham, I will ask you to state—

(Testimony of Dr. M. R. Walker.)

The COURT.—You may go into that matter fully, if you wish.

“Q. (Contg.) Taking one hundred as the total number of units of his physical efficiency before injury, what percentage of efficiency now remains?

A. May I ask whether you mean that as to physical labor, or for anything?

Q. Common laborer, pick and shovel.

A. I should say that he has remaining probably twenty-five per cent.”

Q. Given the same facts as stated in the former question, based upon your examination of Mr. Cunningham, I will ask you to state whether or not in your professional judgment the injury to the nervous system of Mr. Cunningham would have a permanent effect upon his mental capacity?

A. That is difficult for me to give you a definite answer. In order to answer that, I would feel that I would need to observe the man for some time. Just now I would say that ultimately, I would not expect it to have any great influence on the mental capacity of the man. So far as the mental part of it is concerned I think ultimately he might recover from that.

Cross-examination by Mr. JARMAN.

Q. Doctor, what would you say from your examination as to the result obtained in this left leg after treatment, taking into consideration the nature of the injury, as described you by his counsel?

A. Well, judging from just what I can see of it, I should judge that they had obtained reasonable good

(Testimony of Dr. M. R. Walker.)

results, as good results as could be expected under ordinary circumstances. In the condition I find in that limb, I doubt whether there would be any farther improvement. In a general way, in injuries of that sort, for the first year or two years, or three years, the injured part on it [84] is more sensitive, more tender, and as time goes on it heals, and becomes more normal. As I understand, it is now some two years since it was injured, if I am correct. It is possible that it would improve some, but I can't say.

[Testimony of J. W. Legate, for Plaintiff.]

Mr. J. W. LEGATE, called as a witness on behalf of plaintiff, sworn, testified as follows:

Direct Examination by Mr. MILLER.

My name is J. W. Legate. I reside in Carson City and am Deputy Secretary of State, and as such have charge of the files and records of the Secretary of State's office. I have with me documents showing the registration of the Keane Wonder Mining Company of this State. (Witness produces papers, and hands to counsel.) This document designated on the front of it as "Designation of State Agent Keane Wonder Mining Company, Filed June 15, 1907, J. W. Douglass, Secretary of State, by J. W. Legate, Deputy," is a certificate appointing a person as agent, upon whom legal process may be served. The person who was appointed agent of the Keane Wonder Mining Company is named in that record.

"Mr. MILLER.—Q. Is that document part of the official records of the Secretary of State?

(Testimony of J. W. Legate.)

A. Yes.

Mr. MILLER.—If your Honor please, we desire to offer it in evidence.

Mr. MOREHOUSE.—To this document we object on the ground that the same is incompetent, irrelevant and immaterial; for the reason that the cause of action is based upon an injury occurring December 9th, 1911, and that this does not show that the corporation defendant, the Keane Wonder Mining Company, was engaged in business, or was within the State of Nevada at the time this action was commenced, or that it has continued to comply with the law of the State of Nevada in keeping up and maintaining a resident agent, or that it has followed any of the statutes since 1907; or that it has done any business in the State, or is doing any business in the State, that compels it to maintain a resident agent, or that its officers are the same, or that it has continued to comply with the law of the State. [85]

The COURT.—I will make a *pro forma* ruling admitting it, but I don't think it need be read to the jury at the present time. I presume this is to be followed by other motions and proceedings before the Court.

The COURT.—Just read it into the record and then you will have your copy here.

Mr. MOREHOUSE.—Q. That is the only document you have in your office with regard to the Keane Wonder Mining Company, after making diligent search and investigation? A. No."

(Testimony of J. W. Legate.)

There is another paper which was filed on November 18th, 1913.

Mr. MILLER.—Then I will proceed to read it. (Reads:) Endorsement: “Secretary of State’s Office, Nevada. Keane Wonder Mining Co., a Corporation. Designation of State Agent. Filed June 15, 1907. W. G. Douglass, Secretary of State, by J. W. Legate, Deputy.

“State of Nevada, County of Esmeralda, ss. J. R. Elgan, being first duly sworn, deposes and says, that he is an officer, to wit, the Secretary of the Keane Wonder Mining Company, a corporation, organized, existing and doing business under the laws of the Territory of Arizona; that affiant is familiar with the history of said company and with all of the facts relating to its commencement of business in the State of Nevada; that said company was incorporated on the 7th day of March, 1906, by the filing of its articles of incorporation with the proper county and territorial officers of said territory of Arizona; that immediately thereafter said company acquired certain mining claims in the South Bullfrog Mining District, California, better known as Keane Springs, and continued the work of developing the same commenced by its predecessors in title, and has ever since diligently prosecuted, and is now diligently prosecuting such work. That said company did from the 7th day of March, 1906, until about November 19, 1906, maintain an office in Rhyolite, Nevada, in charge of one George Edgar Johnson, in which the business of said company was transacted continually and without sus-

(Testimony of J. W. Legate.)

pension until said last mentioned date, when said office was removed to Goldfield, Nevada. That said Goldfield office was established on or about said last [86] mentioned date, and has ever since been maintained in charge of affiant, and the business of said company has been prosecuted therein continually and without suspension from said last mentioned date to the date of those presents. Said company owns no claims and operates no property in the State of Nevada, transacts no business in said State, except in relation to said above mentioned claims. (Signed) J. R. Elgin.

Subscribed and sworn to before me this 27th day of May, 1907. Augustus Tilden, Notary Public in and for Esmeralda County, Nevada. (Notarial Seal)."

The attached document reads: (Reads:)

"Designation of Agent for the State of Nevada. Know all men by these presents; that the Keane Wonder Mining Company, a corporation formed under the laws of the State of Arizona, and carrying on the business of mining in the States of Nevada and California, has constituted, appointed and designated, and by these presents does constitute, appoint and designate, in accordance with a resolution duly adopted by the Board of Directors of said company, J. R. Elgin, residing in Goldfield, Nevada, its resident agent in said State of Nevada, upon whom process issued by authority or under any law of said State of Nevada may be served.

In Witness Whereof the said company has to

(Testimony of J. W. Legate.)

these presents affixed its corporate seal, and caused the same to be subscribed by its president, and attested by its secretary this 30th day of March, A. D. 1907. (Signed) Homer Wilson, President. Attest: J. R. Elgin, Secretary."

And the impress of the seal of the corporation in the following words and figures, to wit: "Keane Wonder Mining Company, Incorporated, March, 1906, Arizona." Are you through with this witness?

"Mr. JARMAN.—No. One question.

Q. Mr. Legate, you spoke about having another document, as alleged to have been filed in your office by the Keane Wonder Mining Company in 1913, did you mean to say that document was filed by the Keane Wonder Mining Company?

A. No, I didn't understand your question—I meant in relation to it."

"Mr. MILLER.—Plaintiff rests." [87]

"Mr. MOREHOUSE.—Now, if your Honor please, I desire to make a motion addressed entirely to the Court.

The COURT.—Are you prepared to discuss the motion right away?

Mr. MOREHOUSE.—Yes.

(The jury is admonished by the Court and excused until 2 o'clock P. M.)

Mr. MOREHOUSE.—I wish now, if your Honor please, to move the Court for a directed verdict in behalf of the defendant, or a nonsuit, as the Court may see fit to call it, upon the ground:

1st. That the action is brought as a statutory

(Testimony of J. W. Legate.)

action exclusively, under the Act of April 8, 1911, of the State of California; and that it appears by the admission in evidence and the facts at this time, that the defendant, the Keane Wonder Mining Company, has never served any notice that it would comply with, or become subject to, the act of the State of California, upon which this action is based;

2d. Upon the further ground that the action is based upon a statute of the State of California of April 8, 1911, and that it appears from the testimony in this case that the injury upon which the action is founded occurred on the 9th day of December, 1911, in Inyo County, State of California; and that the act in question is contrary to the public policy of the State of Nevada, and therefore the Court will not, under the law of comity, permit the suit to be prosecuted in this State.

And for the further reason, under this subdivision of the motion, that it appears from the evidence that the mining property, and the place of business conducted and carried on by the Keane Wonder Mining Company, is in Inyo County, California, and that the defendant, Keane Wonder Mining Company, at the time of the accident was, and ever since has been, engaged in business in Inyo County, State of California, and has never removed from that State into the State of Nevada. So that the plaintiff, having the right of service of process, the prosecution of his cause of action in California, and the property of the Keane Wonder Mining Company being situated there, that a judgment recovered there could be en-

(Testimony of J. W. Legate.)

forced under the laws of the State of California, and cannot be enforced, if recovered, [88] in the State of Nevada.

The COURT.—That simply goes to the point that this court has no jurisdiction, does it not?

Mr. MOREHOUSE.—That goes to the point so far as the prosecution of this action is concerned, neither the State nor this court has jurisdiction. Of course there has been jurisdiction of the person, but it is going now to the subject matter of the action.

3d. That in the event the Court, in passing upon this motion, should conclude that the plaintiff and the defendant are under the provisions of the act of April 8, 1911, of the State of California, and that the plaintiff, being under the act, would have the right to prosecute the cause of action against the defendant, though he had not come under the act, then and in that event, the cause of action cannot be prosecuted for the reason that no evidence has been offered before the court or jury that the notice of the accident as provided by section 10 of the act of April 8, 1911, has ever been served within thirty days after the accident, or within one year, which is the statute of limitation provided in that section, or at all, and that this action of the statute is a condition precedent to the prosecution of this action.

4th. That the evidence in this case utterly fails to establish any negligence on the part of the defendant; that we have no evidence, except of the bare fact of an injury or accident, and that that does not establish negligence, either as proof or as a presumption,

(Testimony of J. W. Legate.)

in this class of cases; and that the consequence of that upon this motion, standing in the nature of a demurrer to the evidence, it becomes a question of law for the Court, and not a question of fact for the jury." (Argument.)

"Monday, November 24th, 1913.

Court convened 10 A. M.

(All parties present. After calling of the roll the jury is excused for fifteen minutes.)

The COURT.—I shall not go into this motion at any length: I will simply state as briefly as I can my reasons for overruling it. In my judgment, this action is not brought under the act of April 8th, 1911. The right to bring such an action was granted by previous law of California. Plaintiff here has simply sought to avail [89] himself of the provisions of the act of April 8th, 1911, which deprives an employer of certain common-law defenses.

It is apparent that defendant has submitted itself to the jurisdiction of this court. What might have been the result if other action had been taken when the suit was brought, is unnecessary to say. Whatever objection defendant had to the jurisdiction of the Court over its person has been waived.

The difference between the California statute and our own law is not sufficient to prevent this court from taking jurisdiction. It is a well established rule in cases of this kind that a defendant cannot be compelled to pay damages, and there is no case against him, unless the injury resulted from negligence. While the injury itself, under some circum-

(Testimony of J. W. Legate.)

stances, is evidence of negligence it must appear, in order that it may have that effect, that the accident could not have occurred, unless there was negligence on the part of someone—unless from the happening of the accident, it is very probable that it could not have occurred except by the negligence of the defendant.

Much has been said in the course of the trial about the failure to promulgate rules. There are many decisions holding that the failure to promulgate rules is negligence, but when counsel for plaintiff was asked during the argument what rule could have prevented this accident, his only suggestion was a rule forbidding employees from going into dangerous places. Such a rule would hardly be serviceable. If defendant is to be held for negligence in failing to provide a rule, some connection must be shown between failure to provide a rule, and the accident; it must appear, in some way, that the failure to provide a rule caused the injury.

If the company had been negligent in the construction of its hoisting works, for instance, it might have been the grossest sort of negligence, but it could not be regarded here as a reason why the plaintiff should recover, unless it were shown that the defect in the hoisting works in some way caused this ore to fall.

There is no showing that any of the employees were incompetent. Much was said about the failure to give warning. When the duty to warn is present, it [90] necessarily predicates, not only that there is danger, and reasonable cause therefor, but it also

(Testimony of J. W. Legate.)

predicates the fact that the party upon whom the duty is laid, must know of the danger, or must have some cause to apprehend it, or could have discovered it if he had performed his duty.

There is no evidence here showing conclusively that the defendant failed to inspect this roof. True, Mr. Porter, says it was his duty to do it, and there is testimony showing that Mr. Roper didn't do it; still it is not necessary that the company should have performed its duty through these people. Mr. Wilson himself might have performed the duty; others might have performed it, hence the failure to inspect does not seem to me to have been established.

It appears from the testimony that the accident was caused by the falling of a body of ore—something like sixty tons—which it is alleged could not have occurred if the roof had been properly supported. This no doubt is true. If there had been a support under the ore, it probably would not have fallen, but, so far as the evidence shows, such an accident never occurred before. It does not appear from the testimony that any ore or rock ever fell from the roof of that chamber before. The chamber was in the neighborhood of six hundred feet in circumference; it must have been something like two hundred feet in diameter. At points, the roof was twenty feet from the floor; at others it was in the neighborhood of sixty feet. The supports and pillars were few in number; but, in the absence of any showing that these were insufficient, I do not see how we can assume there was any negligence on that

(Testimony of J. W. Legate.)

score. If it had appeared that caves were frequent, then there would have been evidence tending to show the company was negligent in failing to have proper supports for the roof, but there is nothing of that sort here.

It seems to me the only testimony conveying a definite idea that defendant was negligent, was the falling of the orebody itself. It is not my duty to weigh the testimony; it is simply for my determination, as a question of law, whether there is any testimony showing negligence. Now, here is a large chamber; at the point where the accident occurred the hanging-wall was twenty-five feet above the foot-wall, and an enormous [91] body, sixty tons of ore, were left on the hanging-wall. It seems to me that in itself, was negligence; at least it is a fact tending to show negligence. On the existence of that fact I hold there is testimony here showing negligence. The motion is denied.

Mr. MOREHOUSE.—Your Honor will allow us an exception.

The COURT.—Certainly.

Mr. MOREHOUSE.—“If your Honor please, as I understand it, on the first point it is decided that the suit was not necessarily brought under the act of April 8th, 1911; would we not then be entitled to have those portions of our answer which have been stricken out, reinstated as a part of the pleadings?”

The COURT.—Not on the theory that I take of the case. The suit was brought under the law as it existed before, but it was also brought in view of the

(Testimony of J. W. Legate.)

law of April 8th, 1911, which, in my judgment, deprives the employer of his common-law defenses in a case of this sort. Now, that law divides employers into two classes; there are those who voluntarily come under the act, and those who do not; but the first section says that all corporations and all employees are deprived of these common-law defenses. I cannot read the first section as having any restriction or limitation; it applies to all employers of labor; and section 3, and the subsequent sections of the act, provide a method by which corporations, who do not care to litigate with their employees questions of this sort, where they are deprived of their common-law defenses, can avail themselves of that portion of the act which provides for compensation rather than damages.

In making this ruling in reference to the testimony, I do not know whether I made myself perfectly plain, but the fact that the material was of the character it was, and the attendant circumstances in addition to the accident, was what controlled me in making the ruling. If there is anything about it you do not understand, in order that you may avail yourself of the error, if I made one, I desire to make it clear.

Mr. MOREHOUSE.—I concede that upon questions based upon evidence, that the rule which your Honor announced is the correct rule; and I realize the slight distinction in the motion which you have made, and the ruling [92] of the Court as to the bearing

(Testimony of Homer Wilson.)

on that particular point, and one point only, of the testimony.”

(At this time the jury is returned into court.)

[Testimony of Homer Wilson, for Defendant.]

Mr. HOMER WILSON, called as a witness for defendant, after being sworn, testified as follows:

Direct Examination by Mr. MOREHOUSE.

My name is Homer Wilson. I reside at Keane Wonder, California, and have resided there about six years. I know the defendant, the Keane Wonder Mining Company, a corporation and have been president and general manager of said company since 1907. I am thoroughly familiar with the underground workings of the Keane Wonder Mine and was familiar with them on December 9th, 1911, as I was there at that time. The superintendent was John Keith, and George Roper was foreman. I have made a diagram or map of an underground working as it was on the 9th day of December, 1911; it was made the next two days after the accident. John Keith and I went up the next morning, and it took about two days to make the survey there. We made the underground surveys and diagram by making the regular survey with an instrument. John Keith handled the instrument and I assisted him part of the time, and another man part of the time—two of us were there with him. I am familiar with the use of instruments and making measurements and I know absolutely they were accurately made. I have been actively engaged in the mining

(Testimony of Homer Wilson.)

business for eighteen years, as general manager, president of the different companies in which I was interested. The Keane Wonder Mining Company was organized before I purchased it; I purchased the company after its organization, it had already been organized. At the time this accident occurred my headquarters were at Keane Wonder. The only office or place of business I have other than the Keane Wonder Mine is the transfer office in San Francisco, the secretary's office. Have had no offices in this State since October 10th, 1907; we removed all offices then to the mine, excepting the secretary's office. The transfer office at that time was in the Monadnock Building, San Francisco. I am familiar with the map on the board and this is an accurate [93] survey of the ground at that time; this is the working-map at that time showing the position of the ore bodies, and the different drifts, cross-cuts, upraises, and so on. There is one other map here; I would like to put up another cross-section map here to show the cross-section from a different point.

This line indicates the hillside, or mountain side, where the work is being carried on, and this number 4 tunnel through which the men had to go, or this tunnel here, which is a cross-section, you know, like you were in this building, so as to show the different floors. Every workman working along the lines here, had to go through this number 4 tunnel.

(The large map is marked "A"; the cross-section map through No. 5, is marked "B"; and the cross-

(Testimony of Homer Wilson.)

section through shafts and tunnel numbers 1, 3 and 4, is marked "C.")

"A." This map ("B") shows number 4 tunnel, in which they would have to go to reach this ore body where these works were being carried on; and it also shows the upraise from number 5 tunnel to that ore body, through which the ore was dumped into a chute, and it was carried from there out to the rock-breaker.

Q. While you are at it, so the jury will understand it, I am going to mark this tunnel here as number 4. And this tunnel is number 5, isn't it?

A. Yes, that is number 5.

(The points indicated are marked 4 and 5 by counsel.)

Q. Now, what does this represent (indicating)?

A. That represents the upraise from number 5 to the workings that were going on at this point, which was reached through number 4 tunnel. It was usually known as the 180-foot level from the shaft."

"Mr. MOREHOUSE.—I will mark this as upraise, then. (Point indicated is marked 'Upraise' by counsel.)"

With reference to that, that is, from number 4 tunnel, that was the chute that all the ore taken from this ore body here was dumped down through the chute into that. The ore body they were working in is marked in yellow.

"Q. I will mark that ore body. (The point designated is marked 'Ore Body' by counsel.)" [94]

(Testimony of Homer Wilson.)

“Mr. MOREHOUSE.—I will mark that ‘ore’ and this ‘ore.’ (Marking on map.)”

Mr. MOREHOUSE.—Q. Now, in number “C,” this line represents tunnel number 4—this same tunnel as here (referring to map “B”)?

A. Yes, same tunnel.

Q. Now, what is marked here in yellow? (Referring to map “C.”)

A. That is the same ore body.

Q. That is the same marked “180-foot level”?

A. From the shaft.

Q. Is the same ore body that is marked ore body on map “B”?

A. Yes, on map “B”; the shaft is indicated; this is not a cross-cut through the shaft, but it is indicated as you see here.

Mr. MILLER.—By the dotted lines?

A. Yes, but in this shaft the cross-cut is clearly indicated, being a cross-cut through that shaft, and that ore body they were working in at that time was first encountered in that shaft, and then we drifted back to the shaft from this upraise that came from number 5 tunnel.

Mr. MOREHOUSE.—Q. Now, I will draw these little lines down here, and that indicates this upraise? (Draws.)

A. That upraise at this cross-cut.

Mr. MILLER.—Q. The lines drawn by Senator Morehouse on map “C,” and marked “upraise,” indicate the same upraise marked on map “B”?

A. They may not be absolutely correct; it is in-

(Testimony of Homer Wilson.)

licated approximately there, but we would have to measure that; but this is absolutely correct here.

Mr. MOREHOUSE.—Q. What is this line?

A. That is the shaft. (Referring to map “C.”)

Q. I will mark that “Shaft.” (Marks on map “C.”)

This mark between two arrows, 50, on map “C” is the vertical distance, between this drift or tunnel, and that ore body. That is tunnel number 3.

“Q. Is this map correct—map ‘C’?

A. Absolutely.

“Q. And the lines indicating the 100, 200, 300, 400, 500, 600 and 700 feet, designating the distances between north and south and east and west on map ‘C,’ are correct?

“Yes; each of those squares represents a hundred feet—a hundred foot square.

“Mr. MOREHOUSE.—Now, I will offer, if your Honor please, Maps ‘B’ and ‘C’ in evidence.”

Mr. Keith kept all the data for the maps in his note-book. He made the first sketches of maps “B” and “C” from his notes. I had nothing to do with making those particular maps, taking the data and making and drawing them, [95] except to take the sketch, the same as this, and take it to the map man, and have him make it. Mr. Keith had made the rough sketch or map or foundation of it.

“Mr. MILLER.—May it please the Court, I think in order for this to be correctly done, they should introduce Mr. Keith’s testimony to show the data is correct, and these maps are correct from his data.

(Testimony of Homer Wilson.)

It appears this witness had nothing to do with the making of these maps, save and except he carried the chain for Mr. Keith at the time of making the survey. So far as this witness' testimony is before the court, these maps may not be accurate. Mr. Keith may be able to give us the correct testimony.

The COURT.—Do you contend that the surveyor must be present and that he alone can testify to the correctness of the maps?

Mr. MILLER.—So far as the maps in evidence before the court, I think so.

The COURT.—The witness has testified they are absolutely correct.

The COURT.—The maps will be admitted.” (The maps are marked Defendant's Exhibit “B” and Exhibit “C.”)

“Mr. MOREHOUSE.—Q. Now, we will take map ‘A.’ Explain to the jury that map, showing the entrance on tunnel number 4.

“A. This, of course, is a horizontal section of the workings there, just like if that wall there—if I am permitted now to enter into this in a practical way?”

“Q. These curved lines, as I understand it, that I am running my pencil over—I have not marked them yet—are the ore bodies?”

That was the face of the ore on December 9, 1911.

“I will mark this ‘ore body,’ then. (Marks on map ‘A.’) I will mark it ‘ore’ in several places, so we will understand what it is. Now, what does this part of the map represent, in the southwestern part of the map?

(Testimony of Homer Wilson.)

A. That represents the part of the ore body that has been worked—worked out.”

“Q. Then I will mark this ‘worked ore body.’
(Marks on map ‘A.’)

“This northeastern part of the map had also been worked.

“Q. This was worked out. (Marking on map.)

“A. It is worked, except where you see a pillar indicated; there are different pillars left along there.

“Q. These circular lines, or very nearly circular lines, all over the [96] map, indicate what?

“A. Pillars.

“Q. And what do they represent—were they ore bodies?

“A. They were ore left there to sustain and hold up the hanging-wall to keep it from falling.”

“Q. Now, what does the line that is indicated on this map as a straight line, curving here at one little point, and crossed with several little dots, what does that represent on this map?

“A. That is a car-track that the ore was handled over, where they were working to the chute.

“Q. I will mark this car-track on the map. (Marks.) What do these little broken lines running from the car-track—what does the curved part of it represent?

“A. That is the switch.

“Q. I will mark it switch. (Point marked on map.) And what do the dotted lines running from the car-track in a northwesterly direction indicate?

“A. That indicates the survey that was made at

(Testimony of Homer Wilson.)

that time on which the track was to be extended—it was to be extended right along through here (indicating on map).

“Q. There was no track there on the 9th of December? A. No.”

“Q. What are these lines underneath here on this map to indicate?

“A. They indicate at that time we expected to run certain drifts across to a tunnel that we were driving through here, and just had the survey made, to indicate workings which we expected to carry out.”

“Q. When did you say that that survey was made for your map?

“A. It was made the day after—well, two days; the survey was finished in two days after the accident.

“Q. Now, as to the lines that are indicated as pillars, do they actually represent where the pillars stood on that date? A. Actually.

“Q. And the lines indicating the ore bodies represent the ore body as it stood on that day?

“A. Yes, sir.

“Q. Now, what do you say as to the accuracy of that map?

“A. I say it is absolutely correct, according to actual survey and measurements.

“Q. And you participated in that survey and those measurements? A. Yes.

“Q. And you know it to be accurate of your own knowledge? A. Yes, sir.

(Testimony of Homer Wilson.)

“Mr. MOREHOUSE.—I offer map ‘A’ in evidence.”

“The survey for this map was begun a day after the accident by John Keith, myself and a man named Seaman; I held the tape-line. Sometimes [97] I helped to figure out the angles and terms. Mr. Seaman carried the tape sometimes. Mr. Keith took the data and drew the map a few days after the accident. He made the survey and as soon as he could get at it he made his drawing. It might have been a week or more. I overlooked his work and was present when he made it.”

Mr. MILLER.—“If your Honor please, we object to the introduction of map ‘A’ on the ground it was made by Mr. Keith; Mr. Keith took the data; the witness merely carried the tape-line and acted as chain man for the surveyor.

“Mr. Keith took down the data and measured it and made the map, and necessarily it was without the knowledge of this witness, as to the accuracy of the distances outlined on this map and so far as he testified it is hearsay.”

The COURT.—“Q. Have you verified the distances that map?” A. Yes.

“Q. All of them?” A. Yes.”

The COURT.—It will be admitted.

Mr. MILLER.—I ask your Honor to kindly save us an exception on the grounds stated in the objection.

The COURT.—Note the exception.

“The COURT.—It will be admitted.” (Map ad-

(Testimony of Homer Wilson.)

mitted in evidence, and marked Defendant's Exhibit "A.")

There were three piston machines in that mine on level number 4 on December 9th, 1911. This man Porter had charge of one; another man they called Mack, I don't remember his other name, had the other; and I don't remember the name of the man who was running the third machine. I know where these machines were situated at that time.

"Please point out where Mr. Porter's machine was.

"A. Porter's machine was at that point right there.

(Indicates on map.)

"Q. I will mark that on map 'A' with the letter 'P' and a cross. (Marks on map.)"

Q. Now, kindly designate on the map where the machine was that was being conducted by Mr. Mack.

A. That was at this point (indicating on map).

Q. I will put a cross there, and mark it "M." (Marks.)

Q. Now, kindly designate on the map where the third machine was under the employee or man whose name you cannot recall.

A. That was in here, at that point (indicating). [98]

Q. I will simply mark that with a cross, without any letter, because we haven't the name. (Point marked "X.")

I was not present at the time of the accident. I was in this level number 4 the day before, also the

(Testimony of Homer Wilson.)

next day after the accident at about ten or eleven o'clock. I observed that the rock or ore or waste, or whatever it was, had fallen down.

“Q. Will you designate on this map the point where the rock had fallen?

“A. It was at this point, right near the point where the switch was taken off—right here. (Indicates.)

“Q. Just take the pencil and mark X there at the point where it fell. (Witness marks the point on map ‘A.’)

“Q. I will mark that for convenience, and so we will all understand it, ‘X Cave’; what I mean by that is the rock that had fallen down. (Point marked on map ‘A.’) Now, these circular marks near this place where I have marked ‘X Cave,’ represents what? A. Pillars.

“Q. Do you know the size of those pillars?

“A. Well, the exact size is about indicated on that map there; they vary from ten to twelve feet in diameter.

“Q. And what height?

“A. From the height of the distance between the foot and hanging-wall, about twelve feet.”

The height of the stoped-out ground, up towards the face of the ore body, from the foot to the hanging-wall, or top of the stope, would vary from eight to fifteen feet, seldom more than fifteen feet, seldom less than eight; it was not absolutely the same.

“Was there any point anywhere in this worked out portion of this level number 4 where the height

(Testimony of Homer Wilson.)

from the foot to the hanging-wall was over fifteen feet. A. No.

“Q. Was there any point from the foot to the hanging-wall that was fifty or sixty feet?

“A. No, sir.

“Q. What was the greatest height from the foot to the hanging-wall, in any portion of the excavated territory? A. The greatest height?

“Q. Yes.

“A. Oh, fifteen or eighteen feet would be the highest.”

We would put in a stull now and again, where it was needed. I know the character of the rock in this mine. The ore was a quartz, white quartz, carrying two to four per sulphurets, lead and iron. It is [99] known as a low-grade mine. As to the character of the rock through which I worked that was in ore, the country rock is schist and the hanging-wall is schist. The next day after the accident when I went into the mine I saw a mass of schist off from the hanging-wall—slab off the hanging-wall—waste.

“Q. Had you observed any danger in that point it fell, at any time previous to this? A. No, sir.”

“Q. Did you make any examination of this schist rock for ore?

A. “I made no special examination; it was simply a lot of schist.”

The muckers had thrown off what had fallen on the track when I entered the mine. The track was clear and the car was in operation.

(Testimony of Homer Wilson.)

“Q. How long had these muckers been at work there if you know?

A. “Well, they had worked that night and that far in the forenoon when I got there between ten and eleven o’clock.”

It was between ten and eleven o’clock when I got there. There were four muckers; they were not working at that point. I could not say just how much of this fallen body they had removed; they simply shovelled it off of the track, so they could get along with the car. In regard to how much tonnage had fallen from the roof, I would not want to state that there was a ton; as a matter of carloads, I should say there was about two or two and a half carloads, at most, that I saw there. Those cars hold about three-quarters of a ton. The foreman that day was George Roper. I know the location, as I have it marked, of the car-track. The switch was put in the day before the day of the accident.

Instructions were given by me to the superintendent. The instructions were to keep the car-track moved up as close as practical to the face of the ore body they were working in, so as not to have to shovel the ore any great distance; to keep the car as near to the ore as they could. The switch was being built so as to get the car up close to where the machines were breaking the ore.

On that day the men were working with those three machines right as indicated there on that map; machine-men, and the muckers that were working along the line of the machines. [100].

(Testimony of Homer Wilson.)

At the time of the accident there was no work being done at the point where I have marked on that map "cave."

"Mr. MOREHOUSE.—Q. Do you know what work was being prosecuted on the 9th day of December, 1911?" "A. Yes, I know they were working.

"Q. You know that of your own knowledge?

"A. Yes, sir, I do."

Mr. MOREHOUSE.—Q. State exactly what work was being done or prosecuted on the 9th day of December, 1911?

A. Those three machines and one Waugh drill were working there on that level.

Q. You were in there the day before, as I understood you to state? A. Yes, sir.

"Will you state what muck there was to be removed on the day that you were in there, by your muckers; on the day before the accident, and at the point where the accident occurred?"

"The COURT.—Q. You were at that point the day before the accident?

"A. Yes, sir.

"Q. What time of the day was it?

"A. In the forenoon."

(By direction the reporter reads the question.

"The WITNESS.—There was none to be removed."

The COURT.—You want to know whether the muckers on the day shift removed the muck that was left there by the machines on the night shift?

Mr. MOREHOUSE.—Yes.

(Testimony of Homer Wilson.)

The COURT.—I will allow the question.

The WITNESS.—Yes, they do.

Mr. MOREHOUSE.—Q. Now, what other source, if any, was there in this mine on the 8th, when you were in there, preceding the accident, and on the 9th, when the accident occurred, to muck in the mine on this fourth level?

A. Any other source except from the drills, you mean?

Q. Yes.

A. Why, no, there is no other way of getting ore, except to break it with the drills.

Q. Had there been any caves immediately preceding the 9th of December, 1911? A. No, sir.

From the hanging-wall, on the 8th of December, 1911, there was no schist falling at the point where these people were at work on the 9th.

“Q. When you were in there on the 8th of December, 1911, what, if anything, did you observe that indicated any possibility of caving at the point where the cave took place on the 9th of December?

“A. No, there was no indication.

“Q. On the 8th day of December, 1911, when you were in there, was there anything which came to your knowledge that indicated the [101] possibility of caving at the point where this accident occurred?

“A. Nothing.

“Q. How long were you in there on the 8th, through this fourth level? “A. Oh, about an hour.

“Q. Was any complaint made to you?

“A. No, sir.”

(Testimony of Homer Wilson.)

“Q. I asked you whether any complaint was ever made to you by the plaintiff at any time during the time he was at work there? A. No, sir.”

The COURT.—He has already testified that he did not make any.

Mr. MILLER.—The plaintiff testified to that.

Mr. MOREHOUSE.—Q. Was any request of any kind ever made to you for safer conditions than existed in the mine at the time the accident occurred, by the plaintiff? A. No, sir.

Q. Or any other employee who was working in there at that time? A. No.

Q. Why did you leave pillars when working on this level?

“A. Why, to support the hanging-wall, to prevent it from caving.

“Q. At the point where this caving took place, how far was it from a pillar or pillars, and if you know,—state the distance?

“A. Well, it was close by; I should say 10 or 12 feet from the pillar.

“Q. What is the longest distance from one pillar to another, if you know, at the point where the plaintiff was at work on the 9th?

“A. I think it is twenty-three feet, by actual measurement.”

I first heard of the injury to the plaintiff when they brought them down, in the evening; I don't recall the exact hour, it was, I think, after supper-time. I immediately telephoned to Rhyolite to a physician to come out. I telephoned first to Doctor Burlette.

(Testimony of Homer Wilson.)

We put them on beds, washed their wounds and dressed them. I was present and directed what should be done. As soon as Doctor Burlette got there he dressed the wounds. Then I telephoned for Doctor Wheeler at Goldfield. I was not there when he arrived. After Doctor Wheeler arrived he took plaintiff in the auto and brought him to Goldfield. I wrote to the doctor to give him the best attention possible and to advise me how he got along. The company paid all the expenses to Doctor Wheeler and Doctor Dunne. I signed the checks.

Cross-examination by Mr. MILLER.

I have resided at the Keane Wonder Mine about six years. I have [102] stayed there almost permanently since October 10th, 1907. I never resided at Rhyolite nor made it my stopping place. I have stopped there some nights, perhaps maybe a day or two, especially if we were shipping machinery. I was in the works, not in the mine, on the night of December 9th, 1911. I was not in the mine the day of the accident, but was in there the day before, around 10 o'clock in the forenoon, and stayed about an hour, going all through the mine, on every level we were working on and made an inspection of the workings. I went on the fourth and second levels; those were the only two we were working in at that time. I entered the mine on the fourth level, through tunnel number 4. I stayed on the second level probably half an hour, where there were men working. I saw Mr. Roper in the mine. I would not want to swear that I saw Mr. Cunningham, because I would

(Testimony of Homer Wilson.)

see him just the same as I would any other man at work; to identify him, I would not want to do that; I would not want to say that I actually saw him. The same answer applies to Mr. Porter. I have had about eighteen years mining experience, as general manager and president. I was superintendent of the Jenny Lind Mine in Trinity County, and the Chloride Bailey in said county, and the Gambetta Mine in Madera County.

“Q. Calling your attention, Mr. Wilson, to the map, Defendant’s Exhibit ‘A,’ and directing your attention to the car-track, I will ask you to state whether or not there was any track extending from the switch, other than the track that was placed there on the 9th of December? “A. There was.

“Q. Is it indicated on this map? “A. No.

“Q. I wish you would so indicate it. Just draw a line in the same way it is there, if you have no objection.

“A. It is about here (drawing in map); the distance I could not say. Of course I did not survey that; I might have it absolutely correct, and I might have it not absolutely correct.

“Mr. MILLER.—Q. That is your best judgment, is it? A. Yes.

“Q. And this which you have just marked on the map was the main track before that switch was put in? A. Yes.”

I think the track which I have just marked on there was in use on December 8th, for transporting ore; that ore was being taken along in through [103]

(Testimony of Homer Wilson.)

here (indicating on map "A"); before it was worked out in these places, the foot-wall being sloping. It would be hard for me to say exactly the point from which the ore was being taken over that main track, because it was being taken from different points along there on those days, and they were moving the machines, on December 8th. I could not mark just where the ore was coming from on that day—from some point along the breasts.

"Q. Will you mark with a pencil, Mr. Wilson, the track which you have just drawn on that map, with the letter 'W'? (Witness marks track 'W.')

"Q. Now, was there a pillar of ore between the track which you have just marked 'W,' and the surveyed track which is indicated on that map?

"A. Yes.

"Q. What was the size of that pillar which you have just stated was between the surveyed track and the main track, which you marked 'W'?

"A. Well, it was an ordinary size pillar, I could not state positively as to the thickness of it; it would vary anywhere from ten feet to perhaps fifteen, in diameter.

"Q. That particular pillar? A. Yes.

"Q. Give your best judgment of the diameter of that particular pillar.

"A. I should say it was at least eight or ten feet in diameter."

Q. Calling your attention to the mark X upon the map, indicating the machine run by the other man whose name you do not recall, I will ask you to state

(Testimony of Homer Wilson.)

whether or not the muck from the working of that machine was taken over this track "W"?

A. It was.

I gave no instructions for the making of the switch to that track, that was Mr. Roper's business. I was not with Mr. Roper in the mine on December 8th; he was busy at his work; I was with John Keith, the superintendent; he and I would usually go through together. I would always see Mr. Roper in the mine and talk with him. At the time of that conversation, I could not say just where we were; I might have passed him some place, and I might not have met Mr. Roper in the mine on the fourth level that day at all; I might have seen him in the blacksmith shop, or some place on the works. I am positive I saw Mr. Roper in the mine that day, but just to tell you where I saw him, I would not undertake to do it.

"Q. Did you go to the point where this machine run by Mack was working on the 8th?

"A. I was at where every machine was on the 8th; I always [104] did that, to look at the faces where they were working, to see if there was any change, or what the conditions were; that was my business.

"Q. How often did you go in the mine?

"A. Sometimes I would be there every other day; sometimes I would be there twice a week, it depended on what other matters I had to look after.

"Q. Did you make any examination of the hanging-wall of the stope on the 8th?

"A. I always looked at the hanging-walls every time I would go in the mine.

(Testimony of Homer Wilson.)

“Q. You would look at them?

“A. Always, yes, sir; and look at them carefully to see if I see anything that looks dangerous, and I would call Mr. Keith’s attention to it.”

Doctor Burlette got there I think between 8 and 9 o’clock just the exact time I would not be positive, just as quick as he could get there. I paid all the expenses at Goldfield. I have not the vouchers with me, and I could not tell you from memory just how much it was, but I paid every bill sent by the hospital, except the last two. The bill was running from \$105 to \$120 per month; that is what I was paying, and the last two was either \$105 or \$120, I would not be sure about that; those two I didn’t pay because they had them put the matter in the hands of the lawyers.

There were some muckers working on the night shift, the night of the 9th.

The height of the pile of muck on the foot-wall when I saw it was probably three feet, not to exceed that, I could not state; of course where it had been shoveled over, it was a little deeper.

The pile of muck that had fallen from the hanging-wall when I saw it on the 10th was about ten or twelve feet wide. It was a blackish character. I did not dig into it to determine what it was, as I could see from looking at the top of it what it was.

I don’t think the distance between the foot-wall and the hanging-wall of that stope was over eighteen feet anywhere. I took measurements to determine that in places. Where this accident occurred it is not, because I would measure and look at it more

(Testimony of Homer Wilson.)

often where it was large than where it was not so large. It was not more than eighteen feet at the place where this caved.

“A. Well, at the chute the roof had been shot out so as to give them a little more room there from the foot-wall up to the top of the roof, which [105] was not, of course the hanging-wall proper; that might have been eighteen or twenty feet, I do not think to exceed that.”

The country rock at that mine is schist. The foot-wall many times has a dike on it, a diorite dike, but the hanging-wall is always schist. There is no gouge on the schist wall to speak of; there is a little—well, no, you can't call it a gouge proper, at all. It is a seam between the quartz and the schist. It is a graphitic schist, caused by grinding and rubbing against it.

“Q. And it is safe, is it not?”

“A. Yes it is safer than—oh, it varies.”

It varies from the thickness of your hand to eighteen inches, always dry. The color of the seam or soft spot is black. The schist wall itself is black, but not quite as dark; there is two kinds of schist, graphitic and mica; the mica schist is a shade lighter than the graphitic. Where this cave was it was of that character, graphitic schist, lying right against the other. It lies in slabs. The ore was white quartz carrying two to four per cent sulphides. Those sulphides are iron and lead, galena.

I made no special examination there on the 10th of December of the hanging-wall, but just as I would do

(Testimony of Homer Wilson.)

to see if it looked safe in every part. That was the day after the accident. I looked at it carefully. I have always looked at it carefully, in the face of every drift.

“Q. On the 8th of December, how did you get up to the hanging-wall to examine it?

“A. Oh, I didn’t have to get up to it; you could look at it, throw your light on it, and look at it.

“Q. You didn’t go to it at all? A. No.

“Q. Did you use a sounding-bar on it?

“A. At times, in places.

“Q. Did you on the 8th of December?

“A. In several places, yes, sir.

“Q. On the particular place where this cave occurred? A. No, sir, I did not.

“Q. The only way you examined it on that day was to hold your candle up, was it?

“A. Yes, and look at it.”

The color of the hanging-wall at that time, as shown by my candle, on the 8th of December, was dark, just the same.

“A. It wasn’t all dark; in places where the ore hadn’t been shot out, the ore was there.

“Q. The ore was there. A. Yes.” [106]

When I went into the place of this cave on December 10th, the day after it fell, there were men mucking this particular pile of stuff away. They were working close by there, putting it in the cars which they ran into the chute. Some of it they were throwing back, that is, the waste; they did not run that back, they would throw the waste back. Whatever

(Testimony of Homer Wilson.)

ore there might be in it, they would put that in a car. They had only one car. There were two men working there on the morning of the 10th, both throwing into the same car. When they had filled one car, a man would run that to the chute. I don't think there was another car for the other man to fill when he was running the other car away; sometimes that would be the order of things, but I don't think it was that morning. I didn't see the second car I saw only one. I could not tell you who the men were that were mucking there that morning. I was in the mine, an hour, or such a matter. These men were mucking while I was there that morning, that is, the muckers were all at work; they were not all working at this point, however. Two men were working there. I could not say definitely right where the man named Mack worked with his machine on the 8th.

"I do not know where Mack was working with his machine on the 7th nor on the 6th nor on the 5th. I know he was working but I could not say exactly where. I know where Mack's machine was working on the 10th but I don't know whether Mack was running it. I don't know where the third Piston machine was running on the 8th, nor the 7th, nor the 6th, nor the 5th. I don't know where Porter was working with his machine on the 8th, nor on the 7th, nor on the 6th and 5th. The Waugh drill was working somewhere around this mark 'DR.' I did not notice on the 8th particularly where the muckers were at work."

On the 8th the Waugh drill was working out a little

(Testimony of Homer Wilson.)

beyond the end of the track that ran between the pillars. In answer to Senator Morehouse's question I stated that there had been no caves immediately preceding the 9th of December.

"Q. How long before December 9th had there been a cave in that stope?

"A. Well, I don't know of any having been there.

"Q. In all the time you have been there?

"A. Oh, there has been slabs dropped now and then, [107] but nothing of any great importance; those that did drop dropped out in the ground that had been worked out, chiefly.

"Q. And there had been such slabs sloughing off and dropping, had there, at different times?

"A. Now and again.

"Q. In fact, this schist formation, or a slab-like formation, is liable to slough off, isn't it?

"A. At times, certainly.

"Q. You stated a moment ago, I believe, that the foot-wall was sloping? A. Yes, sir.

"Q. Now just what did you mean by that?

"A. I mean the pitch of the vein, the pitch would vary from ten to fifteen degrees from the horizontal."

The pitch of the vein varied at different places along the vein. Sometimes it would pitch fifteen degrees, sometimes ten degrees and sometimes it would be about flat. It was never entirely flat—always had some pitch to it. Sometimes it pitched upwards a little, a sort of wavey line, there would be high places and low ones.

The piston machines were drilling in the face of

(Testimony of Homer Wilson.)

every drift, that is what they did. The piston machine would go in and drill from the foot-wall up about four or five or six feet, and then the Waugh machine would come back of them, and put the holes up in what was left, you see, and drop it down. What I call "upper"; the Waugh machine was for that purpose, a hammer drill. The piston machine simply drilled breast-holes, cut holes, and lifters. The Waugh machine was used exclusively for drilling uppers. They started on what the distance would run along; they drilled from a point underneath the ore body, after the piston machines had done their work.

The employees were not in the habit of making complaints to me direct; they never did.

"Q. You say they left pillars at different times, in place, to support the hanging-wall; was it your practice to cut those pillars afterwards?

"No, after we would get away so it was safe to take them out, if we were not going back in that ground any more, we would put up some stulls, and take them out; if that were good ore, we would get them out. We would not take out all of them; we left a great many of them; we would not work where it was dangerous to work; if we saw it was dangerous to work we would [108] leave the pillar. Where we did not intend to take them out we reduced the size of those pillars afterwards in some places, we cut them.

"Q. You testified, I believe, Mr. Wilson, that the point of the cave was about twelve feet from the

(Testimony of Homer Wilson.)

nearest pillar, is that right?

“A. Well, I don’t know that I testified to the point of the cave; the point where they were hurt—one was hurt against a pillar, and the other was within ten or twelve feet of the pillar.

“Q. Will you indicate on the map which pillar it is that you mean? (Witness indicates point on map.) Mark it ‘N. P.’ (The point is marked ‘N. P.’ by the witness.)

“Q. Now you testified, if I remember right, that there was another, the farthest pillar away from there was about twenty-three feet, is that right?

“A. Yes.

“Q. Mark that ‘23.’

“A. That is the nearest pillar. (Marks the point indicates as ‘23’ on the map.)

“The COURT.—Q. That was the nearest pillar?

“A. The next nearest pillar. Here is the pillar where one was hurt (indicates); and here is the next nearest pillar, where the other one was; they were both close.

“Mr. MILLER.—Q. Now, what was the diameter of the pillar at twelve feet distance?

“A. Well, I should say it was ten or twelve feet in diameter; it might have been more, but it was at least that.

“Q. What was the diameter of the pillar you have marked 23?

“A. Well, 23 was more of a long pillar; it was probably eight feet in diameter, and twelve or fifteen feet long; it was a longer shape, as shown on the map;

(Testimony of Homer Wilson.)

the other one was round, still it was inclined to be long."

Redirect Examination by Mr. MOREHOUSE.

I have heard that John Keith is at a mine, some fourteen miles from Roseland, California.

Q. What effort have you made to have him here?

Mr. MILLER.—That is immaterial, if your Honor please.

The COURT.—If you do not intend to criticize then the testimony will not be permitted.

"Q. I wish you would explain to the jury, because they may not understand it, the difference in the use of the piston machine and the Waugh machine?

"A. The use?

"Q. Yes.

"A. Well, the piston machine is always used in the breast of your drift; we will imagine, for illustration [109], that that board there is the breast of the drift, and with the piston machine they point their holes so as to get the best results from the holes they put in that breast; some pointed this way, and that way, and different directions, so as to get good results in breaking, that drives the breast ahead. In our mine the ore is of that thickness we cannot take it all down with the piston machine; we have to follow the piston drills, the work they do in breasting it up, with the Waugh machine; and it comes along and puts the uppers in the ore the pistons have drifted along, and they fire that, and that drops down from the hanging-wall.

"Q. When you want to get the ore from the hang-

(Testimony of Homer Wilson.)

ing-wall, you use what machine?

“A. They use the Waugh machine, they are the stopers; the Waugh machine is the stopping machine.

“Q. When the ore body is higher than can be reached by means of the piston machine, after you have broken it down by the piston machine, the Waugh machine is used to reach the higher portion of that ore.

“A. Yes. what is left on the hanging-wall.

“Q. What is left on the hanging-wall?

“A. Yes, sir.

“Q. State to the jury why, when you have used the piston machine, that you are compelled later on to use the Waugh machine.

“A. Simply because the Waugh is the machine that can stope that, and drop the ore down.

“Q. Then, after you have used the piston machine, the hanging-wall still remains there, does it?

“A. The ore on the hanging-wall, certainly; yes, sir.

“Q. And what is the character of that ore, as to tenacity or likelihood of falling?

“A. Well, in our mine that ore is very hard, and it is hard to break it down; it takes special powder to do it, special holes have to be drilled so we can break it, it breaks very hard.

“Q. You cannot knock it down, then, except by the use of the Waugh machine?

“A. Certainly, we have to use a stoper; we can't get it down any other way.

“Q. Then, as I understand you, you bore holes in

(Testimony of Homer Wilson.)

the hanging-wall with the Waugh machine, and put your dynamite in there, and discharge it from the hanging-wall?

“A. The ore on the hanging-wall, yes, sir.

“Q. The ore on the hanging-wall? A. Yes.

“Q. You said you were compelled to do that to be enabled to get the ore loose at all from the hanging-wall? A. Certainly.

“Q. And that is so all through the mine?

“A. Yes, sir.” [110]

Recross-examination by Mr. MILLER.

We had the Holman and Sullivan piston machines. It is possible to drill an upper with one of those machines. You don't drill straight with them. At an incline of about sixty degrees.

“Q. And the Waugh machine you set that up by blocking under it and stringing it out?

“A. Yes, sir.”

“Q. How long drills did you ordinarily use with Waugh machines in doing the work that you have described in answer to Senator Morehouse?

“A. Those drills would vary in length from a foot and a half to five feet, perhaps some longer.”

Mr. MOREHOUSE.—That is all.

[Testimony of George Roper, for Defendant.]

Mr. GEORGE ROPER, called as a witness on behalf of defendant, after being sworn, testified as follows:

Direct Examination by Mr. JARMAN.

My name is George Roper. I am a mining fore-

(Testimony of George Roper.)

man and mining superintendent. I have been engaged in that business all my life, since I was big enough to work. At the present time I am superintendent of the Gold Reward Mining Company, which is located four miles from Roseland, California. I worked for the defendant, the Keane Wonder Mining Company, at the Keane Wonder Mine in Inyo County, California, as foreman of the mine. I know James Cunningham, the plaintiff in this action; he was an employee of the company, working at that mine, while I was there. He was a mucker. I employed him. I worked at that mine about a year, probably a little over. I was working at that mine at the time Mr. Cunningham was injured and recollect it, although I could not give you the date, not within a month by my memory, but I was there. Mr. Porter was supposed to be injured about the same time; he was running a machine. I have been in the mining business practically all my life. I used to be superintendent about seventeen years ago in the Pinmore Mine at Randsburg; and also the King Solomon Mine. I was superintendent there a little over two years. Those mines are located at Randsburg, California. I have also acted as [111] superintendent in other mines; I was superintendent of my own properties that I located, after that, at Mohave; and I was foreman at the Ex Post Treasure Mine; and also at the Echo Mine, also at Mohave. I was born on January 9, 1864. I tended a trap-door in a coal mine when I was nine years old and have been working

(Testimony of George Roper.)

ever since in and about mines. I started tending a trap-door and from that I acted as mine foreman and mine superintendent and have owned and operated my own mines. I know Homer Wilson, the gentleman on the witness-stand a moment ago; he is president and general manager of the Keane Wonder Mine.

“Q. Will you state to the jury what your duties were as mine foreman of the Keane Wonder Mine, during the time you acted as such?

“A. Well, it was the same as any other foreman; I had full charge of the mine; I hired and discharged; and anything that was needed at the mine, I reported it to the superintendent, Mr. Keith.”

I had absolute charge of the actual operations in the mine, in developing and extracting ore.

The two classes of men actually engaged in the blocking out of the ore bodies and extracting the ore from this mine were the miners and the muckers.

I will explain to the jury the duties of the miners about the time the plaintiff was injured. I always made it so the machine-men had a clean set-up; the first thing they did of a morning, the machine-men who is designated as miners, the first thing they set up their machines, and the mucker went and helped each man to set up his machine, so he got it set up quick, because the air was turned on fifteen minutes after starting time, and by the time the air was turned on I wanted the men to get the machines to running, and the muckers take care of the balance of the work. By a clean set-up I mean if I had a

(Testimony of George Roper.)

machine working in this place to-day, and shot here to-night, to-morrow I would have the set-up here, which the muckers would clean to-day; and then to-morrow they would clean up the place that was shot to-day; so he always had a clean place to set up. By that I mean that the ore that had been broken down by the previous shots had been cleared away.

Mr. JARMAN.—Q. Who, if anybody, in the employ of the Keane Wonder [112] Mining Company, made a clean place where the miner or machine-man would have a clean set-up?

A. The muckers.

Q. Please state to the jury the duties required to be performed, and which were actually performed by the muckers in the employ of the Keane Wonder Mining Company during the time you were mine foreman, and particularly at the time the plaintiff in this action was injured.

A. It is the duty of all the muckers under me for to keep the tracks as close up to the works as possible, so as they can fill the car without carrying the muck any distance at all, and to see where there was a stull necessary, they put it in—keep the place timbered up, and keep the track up, look after that.

The machine-man at no time ever carried any muck or handled same. Because it is too expensive for a machine-man; if he had time, he would only throw the muck behind him, it would have to be carried again, and in a mine of that magnitude you can set up a dozen times without removing any

(Testimony of George Roper.)

muck. Some of the ore of the Keane Wonder Mine is pretty good grade and some of it ain't. The machine-men were paid four and a half a day and the muckers four dollars.

"Q. Now, in this mine, speaking in reference to its condition at the time that the plaintiff was injured, were there any pillars supporting the hanging-wall? A. In places.

"Q. There were in places? A. Yes.

"Q. Will you describe to the jury what they consisted of, and what they were?

"A. Stulls and pillars.

"Q. Stulls and pillars? A. Yes, sir.

"Q. Now, some of the gentlemen are not mining men; will you explain what a stull is?

"A. Well, a stull is 6 by 6 timber, or 8 by 8; sometimes we use an 8 by 8, and sometimes a 6 by 6; stand them up and down, and then put a big head board on the top of them, and then wedge it into place, until it was solid.

"Q. So as to support the hanging-wall?

"A. So as to support the hanging-wall, and keep any slab that might be loose up there from coming down.

"Q. Now, who placed the stulls that were placed in the Keane Wonder Mine? A. The muckers.

"Q. The muckers? A. Yes.

"Q. Is there a single stull placed in that mine that was ever placed there by any mining man?

"A. By the machine-man?

"Q. By the machine-man. [113]

(Testimony of George Roper.)

“A. No, sir, not one.”

A. Well, Mr. Perez was about the best mucker I had; and as a rule I had him do some of the timbering; and Matt Dropulich was another one.

Q. These two gentlemen sitting back here (indicating)? A. Those are the two gentlemen.

Q. And they were muckers in the employ of the Keane Wonder Mining Company? A. Yes.

Q. And they are the men who put in the stulls?

A. Yes, sir, the most of them.

Q. In addition to the supports which you have designated as stulls, you have stated there were other supports to the hanging-wall, known as pillars? A. Yes, sir.

Q. State to the jury what you mean by pillars.

A. Well, I used to leave a pillar every place that I thought it was necessary for safety of the men.

Q. Did you leave many pillars in that mine for safety? A. Oh, yes.

Q. I will ask you now to examine this map, marked Defendant's Exhibit “A,” which purports to be a map of the floor space of the fourth level, and of the underground workings of the Keane Wonder Mine, of the condition as it existed at or about the time of the injury to Mr. Cunningham. The entrance tunnel I point out to you as being marked “Entrance T,” meaning entrance tunnel; and I point out to you the track running through the chute—the car-track; and the little switch, and the pillar marked number 23, and another pillar marked “N. P.”; also a track drawn in there, marked

(Testimony of George Roper.)

“W”—drawn in by Mr. Wilson while he was on the witness-stand to-day. Also I call your attention to what purports to be the outline of the face of the ore body as it existed at or about the time of the accident; and I call your attention also to the shaft designated upon the map; also the lower level; and I will ask you if you recognize that generally as being a map of the underground workings of the Keane Wonder Mining Company, as it existed on or about the 9th day of December, 1911?

A. Yes. There should be another track down in here—runs down there (indicating on map); that is what they call the old “Pickey Pokey.”

Q. Now, do you know on this map about the place where the material fell from the hanging-wall, by which it is claimed Mr. Cunningham and Mr. Porter were injured? A. Yes.

Q. Will you indicate on the map that point.

A. Yes, right here, between these two pillars. (Indicating on map.) [114]

Q. At or near the place indicated with a cross?

A. Yes, sir.

Q. That is, between the two pillars which are marked “N. P.” and “23”? A. Yes, sir.

Q. Now, I call your attention to two or three little diagrams on this map, apparently marked with circles, and between pillar 23 and the point marked “Chute,” I call your attention to five circles between those pillars which I have designated, and the chute, and ask you what they represent on that map?

A. Pillars.

(Testimony of George Roper.)

Q. Pillars that were left there to support the hanging-wall? A. Yes, sir.

Q. I call your attention, Mr. Roper, to what is marked in here "Car-track"—is that your understanding? A. Yes, sir.

Q. Running over to the chute?

A. To the chute.

Q. Now, are there any stulls in and about the place where these men were injured at that time?

A. Yes.

Q. Will you indicate to the jury and explain to them where they are, and the number of them?

A. Well, there *much* be eight or nine in a row along this side of the track here. (Indicates on map.)

Q. There must be eight or nine stulls along the side of the track? A. Yes.

Q. That is the side of the track toward the face of the ore body? A. Yes, sir.

Q. Now, who placed those stulls there, if you know?

A. I think Mr. Perez put most of them there.

They are lagged on the inside, up about five feet. In future I intended to fill that all up only in here (indicates); that is the reason I lagged up on the inside; I intended to fill it full, and make a false pillar; so when I got this down in here, I could take all these pillars out; it would make it safe for me to take these pillars out, providing I had another false pillar there; it would be what is known as "gob filler."

(Testimony of George Roper.)

“Q. What was the space between the pillar marked ‘N. P.’ and the ‘stulls’?

“A. Well, not to exceed five feet and a half.

“Q. A space of five feet and a half?

“A. Five feet and a half.

“Q. Now, that space intervening between the pillar marked ‘N. P.’ and the stulls what was that space used for? A. The car-track.

“Q. So the car-track indicated on this map was the car-track between the pillar and the stulls; is that right? A. Yes, sir.

“Q. Were there any other stulls in that mine other than those you have just enumerated?

“A. Oh, yes, there is stulls all [115] over; where the quartz is hanging we don’t need any, but these workings (indicating), there is stulls, you know; and the same over in the pickey-pokey here, and the same down through here there is stulls.

“Q. What, if anything, was used at or about the point of the chute?

“A. Well, there is just two stulls there that held the chute up, is all, and there is a pillar on each side of it.

“Q. State, if you know, the distance between the foot-wall and the hanging-wall at the place where the plaintiff is alleged to have been injured.

“A. Thirteen feet four inches.”

On that day Mr. Porter was supposed to be working right here. (Witness marks the point indicated with a cross.) (The point on the map designated by the witness is marked “XY” by counsel.)

(Testimony of George Roper.)

On the day that the plaintiff was injured, I was in and out of the mine all day long; just before the accident occurred, I was in at the mine about fifteen minutes before that. About that time Mr. Porter's machine was not running, and I went over to see what was the matter with it. I knew this because I could not hear it running. I went around the pillar to where Mr. Porter had his machine set up. I turned the air on, and found it wanted some new rings in it, and I told him to take it off the bar, and take it outside, and I went outside with him and repaired it. He took the machine off the bar.

"Q. And he took the machine off the bar at or about the place indicated on the map as 'XY'?"

"A. Yes, sir.

"Q. Is that a place separate and distinct from the face of the ore bodies, nearest to the place that the plaintiff in this action was injured?"

"A. Entirely.

"Q. And how far away was that, about?"

"A. Well, in a direct line I think it is a little over a hundred feet; to go around the pillar you would have to go, at the lowest calculation, three hundred feet one way, and two hundred feet the other."

On that day when I went up to see Mr. Porter I went around the lower way, about two hundred feet around. After I directed him to take his machine off the bar, he did so, taking it outside to the blacksmith-shop. I accompanied him. Mr. Porter carried the machine outside. The blacksmith-shop is located within about thirty feet of what has been

(Testimony of George Roper.)

designated on the map as the "entrance tunnel." This all occurred about fifteen [116] minutes before the accident. I know this because as soon as we got the machine outside I started to tear it to pieces, and I just took out the set holes, and was taking the head off, when the accident occurred.

"Q. Where was Mr. Porter at that time?

"A. Well, he had gone down to that there pillar; he must have been there or he could not have got hurt."

When Mr. Porter carried his machine outside to the blacksmith-shop, he did not assist in repairing it.

"Q. Did you instruct him, give him any directions at that time?

"A. Well, I told him he may as well go in and tear the bar down, and take powder in with him, and load his holes."

I told Mr. Porter to go in, take down his bar, and load his holes—I referred then to the place where he had been at work, indicated on the map as "XY." I did this because that is all he could do. To the best of my knowledge it must have been about four o'clock. They close at five o'clock. We generally fire about ten minutes before five, when they start to spit the rolls. I directed Mr. Porter to load these holes because there was nothing else for him to do. The magazine where the powder was kept was in that little short cross-cut (indicates on map). (The point indicated by the witness is marked "DYN." on map "A.") We kept powder, fuse and caps in

(Testimony of George Roper.)

that. There was nothing else that Mr. Porter needed on that day in order to load his holes.

“Q. Were there any tools or any appliances, or anything connected with the mine, which Mr. Porter needed to obey the instructions which you had given him on that day, which were located in, at, or near the place where the plaintiff was injured on that day? A. Nothing.

“Q. Is there any reason that you know why Mr. Porter should be down between pillars marked ‘N. P.’ and ‘23,’ at or about the time that the plaintiff was injured? A. None that I know of.

“Q. If he had obeyed your instructions, he would have been at a point marked ‘XY’; is that right?

“A. Yes, sir.

“Q. And at the time of the accident you had Mr. Porter’s machine out in the blacksmith-shop, repairing it? A. Yes, sir.

“At that time I did the repairing of the machines used at the Keane Wonder Mine. I made it my business; there wasn’t enough work to have a machinist, [117] so I repaired them myself. Mr. Porter did nothing to assist me to repair the machine that day, he only took the machine outside. When he had deposited it in the blacksmith-shop, his duties so far as the repair of that machine were concerned were ended. This mine was equipped with certain tools, or implements to work with, the same as there is in any mine.

“A. Well, with picks, shovels, hammers, Waugh drills, Holman drills, bars, and tamping-bars; that

(Testimony of George Roper.)

is, long wooden sticks for to tamp the powder in the holes with; about the same as there is in any other mine, that is all.

“What do you mean when you say bars?”

“A. Long bars of steel, for to bar down the backs.

“Q. Will you state to the jury what you mean by barring down the backs?”

“A. Well, if there is a slab, or anything left on the roof, and if we see a little, we try to get it down with those bars; and if we can't get it down, and think it is dangerous, as a rule we put a stull in it; but we always pull them down, if possible.

“Q. Always pull them down if possible?”

“A. If possible, yes, sir.

“Q. Now, who pulls them down?”

“A. Well, the muckers, of course.”

We kept the stulls we were using at the entrance to the tunnel, as a rule, and sometimes we have two or three inside. On the day the plaintiff was injured, there were stulls for use in that mine which were near and convenient.

“Q. Was there any direction or instruction of any kind, or any rule pertaining to that mine, which would in any way forbid the plaintiff in this case, or any mucker, or any miner employed by the Keane Wonder Mining Company from using a stull and putting it in place if he saw any place where it was needed? A. No, sir.

“Q. You have already testified that you were up through this mine six or seven times at least, daily?”

“A. Yes, sir.

(Testimony of George Roper.)

“Q. While you were there, what did you do?

“A. Well, my main duty was to see that the mine was kept safe—watch the roof; and see that the men did their work.

“Q. And did you fulfill your duties?

“A. To the best of my ability.

“Q. Did you at any time while in the employ of the Keane Wonder Mining Company, and particularly on the 9th day of December, 1911, see anything in the nature of the hanging-wall, or any ore on the hanging-wall, which would indicate to you in any shape, manner or form, that there [118] was any likelihood of the ore falling below, with the possibility of injuring any employee in the mine?

“A. No, sir.”

I know the general character of the ore in that mine; it is known as the bull quartz—very hard; and in about the middle, a little up above the middle, there is a seam that carries a little small part of galena, and that has caused a cleavage, up to that seam we take it out with the piston drills, and then afterwards, why, we take down what is known as the backs—that is the quarts that is left—with the Waugh drill.

“Q. Now, as I understand you, the ore between the foot-wall and the hanging-wall at a distance of about five, or six or seven feet—there is a sort of a seam? A. Yes, sir.

“Q. Or a cleavage? A. A cleavage.

“Q. And the lower part of that ore body you use the piston drills, by putting in the holes, loading

(Testimony of George Roper.)

them, and breaking away the ore below that cleavage? A. Yes, sir.

“Q. And that ore on account of that cleavage is taken out, leaving hanging the ore above?

“A. Yes, sir.”

That was the general character of the ore in the mine during the time I was employed there. After the lower portion of the ore is removed, then the upper body of the ore is removed by using Waugh drills. We drill in that ore; the holes we drill are designated as “uppers.” They are put in there with this Waugh drill, as distinguished from what we call the piston machines.

“Q. Why is it necessary to drill holes in ore on the hanging-wall—why does it not fall down naturally?

“A. You do pretty well to shoot it down; it takes a good many holes; you can’t put those holes above eighteen inches apart; the quartz is very tough; even after you do break it and shoot it sometimes it is almost impossible to bar some of it down; it holds together, you know; it is big, bulky stuff, therefore it is very tough—very tough to break.”

We have broken down the upper portion, that is, the portion on the hanging-wall, with the bar after it has been shot, not before.

“Q. Can you state to the jury what area, if any, or what extent you have removed the lower portion of the ore below that cleavage or seam, allowing the ore on the hanging-wall to remain?

“A. Well, after this [119] accident, I shot a

(Testimony of George Roper.)

place out there larger than this room, without even a pillar at all in it, and left the ore all hanging, and then I drilled a series of holes all the way around, which I can show you on the map there—the block of ground; I drilled a series of holes all the way around it, and after the men went away I went and loaded those holes and blew that thing myself, and that all came down, a little over fifteen hundred tons, at one time, that all came down.

“Q. That was ore that was left on the hanging-wall?

“A. That was ore that we took down with the Waugh drill.

“Q. Before that was taken down of course the ore beneath had been removed? A. All been removed.

“Q. And the miners and muckers were at work under that hanging ore all the time that the lower body of ore was being removed? A. All the time.”

“Q. No, I was referring to the ore that was removed below by the piston machines?

“A. Oh, all the way from six to seven feet.

“Q. From six to seven feet? A. Yes.

“Q. Now, the ore that would remain above that on the hanging-wall, what would be the width generally, as to that?

“A. Well, from three to five feet, but mostly about three; it rolls a little you know.”

The thickness of the ore that remained on this area which I shot down at one time would average possible four feet.

“Q. Will you state to the jury the general size of

(Testimony of George Roper.)

the pillars that would remain standing between the chute and the pillars near the place where the plaintiff was injured?

“A. Well, they were pretty big pillars right there, possibly ten or twelve feet through them.

“Q. Were there any pillars as much as ten or twelve feet through?

“A. Oh, yes, there is some there; those pillars left there now, they are about ten or twelve feet through.”

As to the smallest pillar that was ever left in that mine, for use as a pillar, I cut one down one time to about thirty inches; that is, it broke away to about thirty inches in the center, but at the base, that same pillar at the base is fifteen or twenty feet across.

“Q. What would you say was the average size of the pillar that were [120] allowed to remain in that mine for the protection of the employees?

“A. Oh, they will average up about ten feet.

“Q. Average about ten feet? A. Yes.”

In the immediate vicinity to where plaintiff was injured, between there and the chute, I think there is five or six pillars.

“Q. And were there any pillars near the place where the plaintiff was injured?

“A. Two, right there.

“Q. Were they small or large?

“A. Well, about ten foot.

“Q. Do you know whether those pillars are there now or not? A. Those pillars are there now.”

The pillar that I am referring to now is the pillar next to which Mr. Porter was injured.

(Testimony of George Roper.)

Q. What was the general length of the timbers provided by the company for use in the mine as stulls?

“A. Well, as a rule we used about twelve feet; in some places, right in and around where those pillars are, we used twelve foot stull; and the old pickey-pokey, I used a stull there, the longest stull in the mine was fifteen feet ten inches.”

“MR. JARMAN.—Q. Will you state what you mean by a pickey-pokey in a mine?

“A. This part of the mine here (indicates on map ‘A’), I worked it all out with hand drills.” (The witness marks the place indicated by him on the map with a circle.)

I have already testified that at the time of the accident I was in the blacksmith-shop. I went in the mine that night, after I got the men down the hill, possibly seven o’clock. The first I knew that any one had been injured in the mine that day, I heard the cave from the blacksmith-shop, and I started to go in, and met somebody, I could not tell just who it was, coming out, and they told me that Mr. Cunningham and Mr. Porter had been caught in a cave. I immediately started to get help, and got on the outside of the mine, and inside of a very few minutes we had them outside. I did not go back into the mine at that time where the cave was, but ran out and got old Ben Chambers, and all the men I had on the outside, the blacksmith and all of them.

We got two spring cots, and put them on; and I remember Mr. Cunningham, I got my little boy’s mat-

(Testimony of George Roper.)

tress and bedding, and made a bed and put Mr. [121] Cunningham on it, and we carried him down the grade that way. The next time I went into the mine was the first thing after supper, I should judge it was about seven o'clock. I went to the place where the cave was and found the cave, the stuff that had fell down there, just as it had fallen.

“Q. Will you indicate on the map to the best of your judgment, where that cave was?

A. Yes, right here on this side, between those two pillars. (Indicates on map.)

“Q. Near the point marked on the map there with an ‘X’? A. Yes, sir.

“Q. Now, when you went there and saw this cave and the results of it, describe to the jury exactly what you found there?

“A. Well, I found that some rock had fell down there, 5 feet by 8 by 8 feet long, that is, running to a taper point, and where it broke off the pillar, it was 38 inches thick.

“Q. By your testimony you mean that where it broke off the pillar it was 38 inches thick, and you mean to testify that was up near the pillar?

“A. That was near the pillar, that is where it broke.

“Q. Explain to the jury what you mean by going out to a taper point?

“A. Well, it ran from there out to a wedge point, about five feet out. On a run of slab like that, you see when you have gone through it, and shot off, it would not break square off, it would break off and

(Testimony of George Roper.)

leave a slant, you know."

At the present time, from the foot-wall right to the top where it fell down, is thirteen feet, four inches.

"Q. Now, the place where it fell from the hanging-wall overhead, did it fall directly down?

"A. Yes, sir.

"Q. Do you know whether or not where it fell directly down was the place where either the plaintiff or Mr. Porter were injured?

"A. Why, Mr. Porter was up again one pillar, and Mr. Cunningham up again the other one; one of the largest lumps that fell rolled over, and rolled on Mr. Cunningham and broke his leg."

"Mr. JARMAN.—Q. Mr. Roper, where were Mr. Perez and Mr. Cunningham supposed to be at work at or about the time this cave took place in that mine, if you know?"

Mr. MILLER.—That is objected to as incompetent, irrelevant and immaterial in any case. They might show where they were ordered to work, if they were so ordered to work in a particular place, but not where they were [122] supposed to work.

The COURT.—You can show where they were at work, if you wish to.

Mr. JARMAN.—No, I cannot show by this witness where he was actually at work, but I can show by this witness where he should have been at work.

(Argument by counsel.)

Mr. MILLER.—I object on the further ground, if your Honor please, that in this case the evidence concerning Mr. Perez, or concerning Mr. Porter, is im-

(Testimony of George Roper.)

material; this is the case of Cunningham *versus* the Keane Wonder Mining Company. (By direction the reporter reads the last question.)

Mr. JARMAN.—I will withdraw that question as to Mr. Perez, and confine it to Mr. Cunningham. I think it is a proper question.

Mr. MILLER.—We make the same objection on the “supposed to be.”

(The question as amended is read by the reporter as follows: “Q. Mr. Roper, where was Mr. Cunningham supposed to be at work at or about the time this cave took place in that mine, if you know?”)

The COURT.—I will sustain the objection to the question in that form.

I instructed the muckers in the employ of the company as to the place where they should work. On that day I instructed the plaintiff Cunningham, as a mucker, to do and perform certain work in the afternoon at about four o'clock, about the time it is alleged he was injured. I told Mr. Cunningham and showed him and Mr. Perez—put them on the car and showed them the pile of ore that they had to take and muck out, and muck into the chute; one man was supposed to be on one side of the track, and the other on the other, and load that ore in that car, and when they got the car full to run it through between these two pillars where the cave was, and run it down and dump it into that chute; and when they had dumped the car, they would go back and refill it again.

“Q. Can you indicate on this map the place or point where they were required to fill this car?”

(Testimony of George Roper.)

“A. Yes, sir.

“Q. Will you do so?

“A. Yes, sir. About here (indicates).

“Q. Just mark that ‘car.’ (The point indicated by the witness on the map is marked ‘car.’)

“Q. Now, what is the distance, if you know, from where that car was, where they were supposed to load, to the place where the cave occurred? [123]

“A. Oh, I presume sixty or sixty-five feet.”

I saw a car in that mine when I went back that evening; it was a car owned by the company and used by the employees of the company for transporting muck to the chute. That day Mr. Cunningham and Mr. Perez had been using the car I went to look at.

“Q. Did you look at that car? A. Yes, sir.

“Q. When did you look at that car?

“A. As soon as I went in the mine.

“Q. That day? A. That day.

“Q. Where was that car when you went there?

“A. About sixty-five feet from the cave.

“Q. About sixty-five feet from the cave?

“A. Yes, sir.

“Q. Where in the mine in relation to the point you have indicated here and which has been marked ‘car’?

“A. That is right there where the car was.

“Q. That is right where the car was?

“A. Yes, sir.

“Q. What was the condition of the car when you found it about 7 o’clock on the night of the day of the accident?

(Testimony of George Roper.)

“A. Well, the car was the same as it always was, about one-third full of quartz.

“Q. About one-third full of quartz?

“A. Yes, sir.

“Q. State what you mean when you say the car was the same as it always was.

“A. Well, in good running condition.

“Q. Was it in running condition?

“A. Certainly.

“Q. Was that car damaged in any way?

“A. No. The car was all right, and about one-third full of quartz.

“Q. On the day of the accident, Mr. Roper, were you or were you not at and about the place where the cave took place in the mine? A. Oh, yes.

“Q. How close were you to it at any time during the day?

“A. Well, I guess I went right at the place, right underneath it, at least six times that day.

“Q. Did you see anything while at this place or about this place, which would indicate to you in any way that there was any danger from a cave from the hanging-wall?

“A. No, sir.”

“Q. Did any one on that day, whether in the employ of the Keane Wonder Mining Company, or otherwise, while you were in the mine, or out of it, or at any time prior thereto, direct your attention to the part which actually caved, as being dangerous?

Mr. MILLER.—“Object, if your Honor please, as incompetent, irrelevant and immaterial under the

(Testimony of George Roper.)

pleadings in this case—the answer of the defendant. There are only two defenses left in the answer. One defense was this was purely accidental and the other that this man was outside the line of [124] his employment; so this question cannot be material.” (Argument.)

“The COURT.—I shall allow the question. If it appeared that the defendant knew that condition, knew that it was dangerous, and allowed these men to go there, the jury would be warranted in giving a very different sum of damages than they would if it appeared that the defendant know nothing about it. I think the knowledge of the defendant of the dangerous condition of the roof is a very material matter.”

“Mr. MILLER.—Will your Honor kindly save us an exception on the ground stated in the objection?”

“The COURT.—The exception may be noted.”

(By direction the reporter reads the last question.)

“A. Not on that day, but before that day Mr. Perez and me tried to bar the thing down with two long bars, but we could not budge it—about two days before the thing fell down.

“Mr. JARMAN.—Q. What effects did you make in endeavoring to bar it down?

“A. Well, we got two long steel bars, and tried our best to pull it down.

“A. And didn’t succeed?

“A. We could not do it; no.

“Q. And why did you cease in your attempts to take it down?

“A. Well, we came to the conclusion there was only

(Testimony of George Roper.)

one way to ever bring it down, and that would be to drill it, and blast it down.

“Q. At that time, when you ceased your labors, state whether or not you considered it safe or unsafe in the position in which it remained?

“A. We considered it safe.”

“Mr. JARMAN.—Q. What was the method adopted, the usual and customary method, in the Keane Wonder Mine for ascertaining whether or not any ore on the hanging-wall was safe or unsafe?

“A. Well, if we had any idea—we were all of us looking at it all the time—and if we had any idea anything was unsafe, I would take and get a pick and sound it to see if it was drumming or not, and if it was, and we could find a crack there in it anywhere, we would try to pull it down; otherwise, we would take and put a stull under it for safekeeping.

“Q. When would you put a stull, under what circumstances would you put a stull under the portion?

“A. Well, it would have to be a little away from a pillar, because if it was drumming right over a joining in a [125] pillar, you know, a pillar was just the same as a stull, it would hold it.”

A stull acts, does the same service in a mine as a pillar, only of course it would be smaller. Those stulls that are in there now alongside of that track, they ain't put in there because that is a bad roof; that roof is good where they are put; those stulls are put in there purposely for to lag up on the inside, and make a pillar there, not because the roof is bad; they ain't there for that purpose, that row of stulls that

(Testimony of George Roper.)

is in there at the present time. They act as an additional protection to the employees engaged in and about that mine, at that place. A pick is the best instrument to use to take care of anything overhead which indicates being drummy; and if it happens to be up above the pick, why get a short piece of steel, a short bar.

“Q. Now, could you have taken down this overhead which you have just referred to, with a pick?

“A. No, you can take down things with a bar that could never begin to budge with a pick, because you can get the leverage on them. We tried it with two bars, and then we couldn’t even get it to stir.

“Q. And you ceased your efforts in taking it down?

“A. Yes.

“Q. For what reason?

“A. Well, because we thought it was impossible for it to fall.

“Q. What employee of the Keane Wonder Mining Company was it whose duty it was to use these bars in an effort, or in taking down any rock in the mine which was on the hanging-wall, and which might prove dangerous to any person in the mine?

“A. The muckers.

“Mr. JARMAN.—Q. Will you explain to the Court and jury why it was the duty of the muckers particularly to attend to that work?

“A. Well, by the time that the hanging-wall was cleaned off, the machine-men was working on this here first layer, and they were away from it entirely. The machine-men in the Keane Wonder Mine didn’t

(Testimony of George Roper.)

do anything only except set up their machines and drill; the muckers had to do all the mucking, and look after the balance of it; when the roof was shot down, the second layer of quartz with a Waugh drill, if there was anything left there, the first thing that the muckers was to do every morning, the first thing they did was to go and bat that down, if there was any left there hanging; that was their duty [126] and after that was all stripped off, if the schist—which was the formation—any of it began to slab, or any signs of it, we would try to bar it down, and if we thought it was a little drumming, we would just take and put a stull in for safekeeping; it was the mucker's duty to do that.

“Q. Did you at any time ever instruct the muckers in the employ of the Keane Wonder Mining Company that such was or was not their duty?

“A. Well, I instructed them all that it was their duty.

“Q. Their duty to do what?

“A. For to get the dirt away and look after their safety—to bar the roof down.

“Q. Now, in reference to the place where this injury occurred in this mine, indicated on map ‘A,’ by a cross, and being at a point near the pillars marked ‘23’ and ‘N. P.,’ will you state to the jury, as your best knowledge on the subject at this time, how long prior to the accident the ore had been taken out? At the point where the rock fell.

“A. At least two months.

“Q. Now, will you state whether or not the line in-

(Testimony of George Roper.)

dicated on this map as a wavy line, and which purports to represent the face of the ore body as it existed on that day, correctly portrays the face of the ore body as it existed at that time, according to the best of your recollection? A. Yes, sir."

Q. What is the distance, if you remember, between the point where Mr. Cunningham was injured and the nearest face of the ore body then standing?

A. The nearest place that I was working at that time would be at least seventy feet. At least that; from that up. The reason why we left this ore projecting out further from another portion of the face of the ore was because it helps hold the roof.

"Well, after I had got it all taken out, all but my pillars, then take and put the false pillar along there, as I told you, and then I could start in and draw the pillars."

When it became necessary to make any repairs to a machine, or any other appliance used in the mine, they would go to my office to make repairs or get supplies. My office was just outside the mine, about thirty feet from the blacksmith-shop. No supplies of any kind were kept in the mine for the repairs to machines—too expensive, they would get lost in the mine, little things like them.

On the day Mr. Cunningham was injured there were no men in the employ of [127] the Keane Wonder Mining Company engaged in working on any pillar in that mine. I had Mr. Porter starting off a new place, up on the old pickey-poke car-track; and the other men was working in the large body of ore.

(Testimony of George Roper.)

There is a large body of ore (indicates on map "A"). This ore which is represented by this wavey line, as being its face, is the body of ore that I refer to.

Tuesday, November 25, 1913.

Court convened 10 A. M. (All parties present.)

Direct Examination of Mr. GEORGE ROPER,
Resumed.

In my judgment, not to exceed five to seven tons of ore fell at the point which has been designated as the cave. There was a little quartz mixed in with it, but it was chiefly schist. The next morning I had it throwed over behind the lagging. They started to work at seven o'clock the next morning on that body of rock or ore.

"Q. Do you recollect who you put to work there?

"A. I put my muckers to work; Mr. Perez would be one of them, and Louis Guerra, and his brother; I believe the four muckers that was on that shift; anyhow they would be the ones I put to work to move it.

"Q. Part of that stuff you say was put over behind the lagging? A. Yes, most of it.

"Q. Do you recollect what was done with the rest of it?

"A. Just put it to one side, so we could get the cars by and then put it in the cars, and put it in the chute."

I had to move it so as I could get my two cars by, so as I could get the ore out of the face, to keep the mill going, and I only had the two cars in the mine at that time. "The cave was between the two cars and the chute."

(Testimony of George Roper.)

There was only two cars there that was used for transporting ore in that section of the mine; down below there was another car in the same mine, but it was away down below where Mr. Porter had been previously working, for months previous to this; but that was working on waste; I tried to find another body of ore. These two cars was the only two cars that was transporting ore for the mill. On December 9th, 1911, Mr. Perez and Mr. Cunningham were using one of them and I believe Louis [128] Guerra and his brother, the other. As I have already stated I was in and about that mine during that day and saw Mr. Cunningham and Mr. Perez working there that afternoon. I know where they were working and I know where they were directed to work as I directed them. I will state to the Court and jury the place that I directed them to work.

“A. Yes, sir; I can show it on the map.

“Q. Will you kindly do so?

“A. Right here (indicating on map ‘A’).

“Q. At the point which is marked ‘car’?

“A. Yes, sir.

“Q. Did you see Mr. Cunningham and Mr. Perez working in the mine on that afternoon?

“A. Yes, sir.

“Q. State to the Court and jury the point that you saw them at work. A. Right at that car.

“Q. Right at the point which is indicated on the map as ‘car’? A. Yes, sir.

“Q. How far, if you know, is that point from the place where the cave actually fell?

(Testimony of George Roper.)

“A. Sixty-five feet.

“Q. How do you know that it is sixty-five feet?

“A. Because I measured that thing the first thing the following morning, to find out exactly.”

“Q. Did you on the 9th day of December, and particularly at any time during the afternoon of that day, direct or instruct the plaintiff in this action to do any work as a mucker in that mine at the point where this cave took place? A. No, sir.

“Q. Was there anything there for him to do?

“A. No, sir.

“Q. How long previous to the 9th day of December, 1911, had there been mining at or about that point?

“A. Well, at the lowest calculation, that work was done there at least two months before that.”

Q. From the time, which according to your best judgment you say is two months prior to that time, state whether or not mining operations were conducted on the ore body moving forward?

A. All the time.

No work had been done at or about that point in the way of mining operations for at least two months. After the period of time which I have designated as two months prior, at least two months prior to December 9th, I took out about a hundred tons of ore, from ninety to one hundred tons of ore, daily, out of that body of ore, and half of it came through between those pillars, and half of it straight ahead. I always managed to have one machine on one side and one on the other, so as I could have two men tramming from

(Testimony of George Roper.)

one of the tracks, and two men tramping from the other. [129]

“Q. Do you mean by that that it came through the pillars in cars?

“A. In cars, yes, sir. On the track which is designated as the main track there was one car transporting ore to the chute. I always made arrangements for two men to be on the car here, and two men to be through between these pillars in here (indicates on map ‘A’); while these here men was filling this car, this car was running to the chute and dumping it in; and when they were coming back, these men would be the next ones to take their car out; I always had one machine at this point, and one over here, breaking or all the time; and sometimes three machines in this radius in here; this was a solid body of ore I was working on at that time, and this track started here, and we worked to this point.

“Mr. JARMAN.—In order that the record might be identified so as to distinguish the two tracks; one track is the main track, and the other track referred to by the witness is designated on the map as the Wilson track, and is marked ‘W.’ Is not that right, Mr. Miller?

“That is the track Mr. Wilson drew on the map.”

Previous to this cave, not to exceed fifteen to twenty minutes at the outside, I was in the mine. I was around where Mr. Perez and Mr. Cunningham was working, and also Louis Guerra; I went right through the place where the cave happened, went around, and I had to go around that there block of

(Testimony of George Roper.)

ground to the right, to get around to where Mr. Porter was working; his machine had broke down, it wasn't running, and I went up there to see what was the matter with him. If it had been running, I would have heard it, but I heard no sound. When I noticed there was no sound coming from the position where Mr. Porter was supposed to be working, I was around where Mr. Perez and them was working and saw them. They were shovelling the ore in that car. The car was at the place where it is marked "Car." That was sixty-five feet from the cave.

"Q. State to the Court and jury the condition of the mine at the actual place where you saw Mr. Cunningham and Mr. Perez at work with reference to the ore?

"A. Well, at the place where they was shovelling, there was only a part of the ore taken out.

"Q. What part was that?

"A. Well, the lower part, or ranging all the way from six to seven feet—the upper [130] part was all left yet.

"Q. The upper part was left?

"A. Yes, they had not shot that down; that was the part that we shot down later with the Waugh drills.

"Q. So that the point where the plaintiff and Mr. Perez were working the last time you saw them on the afternoon of the day the accident occurred, was at or near the point indicated on the map and marked 'Car'? A. Yes, sir."

(Testimony of George Roper.)

“Q. And they were working under that ore which was then remaining on the hanging-wall?

“A. Yes, sir.

“Q. Did you ever have any conversation with the plaintiff, Cunningham, in reference to his employment with the Keane Wonder Mining Company?

“A. Yes, sir.”

“Mr. JARMAN.—Q. You may state to the Court and jury what that conversation was; state just exactly what Mr. Cunningham said to you, as near as you can remember.

“A. Mr. Cunningham asked me for to give him the next machine; I asked him if he could run one, he said he could run one as good as any man in the mine. ‘Well, then,’ I says, ‘I will give you the next machine.’

“Mr. MILLER.—If your Honor please, I move to strike out the testimony as being incompetent, irrelevant and immaterial, going to no issue in this case, and contradicting no statement of the plaintiff whatever; he said he was a mucker, and did the work of a mucker at the time he was injured, and all the time before.”

“The COURT.—Do you contend that he knows nothing except mucking?”

Mr. MILLER.—“A. So far as his work is concerned, no. His testimony is that he did nothing but mucking; that stands uncontradicted. Now, if he asked Mr. Roper for a job as machine-man, how does that affect the question, unless he had a machine-

(Testimony of George Roper.)

man's duties to perform on the day of the injury? I don't know how it is material at all."

Mr. JARMAN.—"From our standpoint it is material to show by this man's own words that he represented to the defendant that he was a miner; and that, as a matter of fact, he was the next man in line for a machine in that mine."

(Argument.)

"The COURT.—I will deny the motion. It seems to me if a man goes in a mine who is utterly ignorant, and another one goes in to do the same sort [131] of work, who is a thoroughly experienced miner, that fact would have a decided bearing on the question of comparative negligence, and for that reason I shall deny the motion."

"Mr. MILLER.—I desire to save an exception on the grounds stated in the objection."

The Whip Saw is another mining claim about half a mile away from this one, which the Keane Wonder Mining Company was operating at that time. I did not state to the plaintiff on that day that I was going over to the Whip Saw, because I would not tell anybody if I was going over to the Whip Saw that I was going. I would not want any man in that mine to know I was away from it; I would not want them to know I was going over to the Whip Saw; I would not tell any man that; you know how men are, if the boss is away and they know he is away, they are liable to lay down a little on him. Naturally, I would not tell him I was going over to the Whip Saw.

"Q. Now, for what distance, or what radius from

(Testimony of George Roper.)

that point will that measurement hold true?

“A. At least two acres.

“Q. At least two acres? A. Yes, sir.

“Q. Around and about that place, the distance between the walls is about thirteen feet four inches?

“A. Yes, that is the highest point, and the cave made that the highest point; that is how it comes to be that high. As a rule, we used to put twelve-foot stulls in that section; that row of stulls, there is none of them over about twelve feet in length.”

The gauge of the track used in that mine at that time was eighteen inches. I was at no time on December 9th, 1911, engaged in any work on the track or any switch at or near the point of the cave. The track and switch at that point had been in place and in use and operation at least two months at the time of the cave. On that day there was no work done by me on the tracks or directed to be done that I remember. I always laid the switches on the tracks myself. If Mr. Perez was around I would get him to help me, because he was a very handy man. I never had anyone else to assist me other than Mr. Perez for several months. On December 9th, 1911, I did not direct the plaintiff in this action to do anything in reference to the [132] laying of rails or moving of the car-track.

“Q. Was there any necessity, or was there any reason, if you know, why anything should be done with the track at the point where the cave took place?

(Testimony of George Roper.)

“A. There was no necessity for doing anything there.

“Q. State, if you can, any reason that you know of why the plaintiff in this action should have been at the point where the cave took place at the time it did? A. There was no reason whatsoever.

“Q. Where should he have been at that time, if you know?

“A. At the place marked ‘Car’ on the track, helping Mr. Perez to fill.”

Every time the car was filled it was the plaintiff’s duty to run right through between those pillars, and dump the car in the chute, and then take it back again. It was his duty to do that continuously all day long. The plaintiff did not do that work alone; Mr. Perez would run one car out on time, and then Mr. Cunningham would run the next car out; that was their duty, to run every car; just one man went out with the car after they got it loaded. While one man was taking out the car the other one would taper off for a few minutes until the car came back again. He would have a few minutes rest. As I stated, the next morning I went into the mine about seven o’clock; very nearly every man I had working for me in the mine accompanied me at that time.

“Q. And what was the first thing you did on entering the mine at or about the place where the cave took place at that time?

“A. Went over, found out and looked at the exact places where the men got caught.”

I had the men that took them out show me the

(Testimony of George Roper.)

exact places where the men got caught. The men who showed me were Louis Guerra and Mr. Perez and others; there was half a dozen of them. They went with me. There may have been two others with me that were working in that section of the country. There were at least a dozen men there at that time looking at the place where the cave took place. There was a miner named Ed. Williams there. He is the man sitting in the courtroom back there (indicating).

“Q. Now, will you indicate on this map the point which Mr. Perez and Mr. Guerra pointed out to you as being the place where Mr. Cunningham was injured? A. Yes, sir.

“Q. Will you do so?

“A. Mr. Cunningham was caught [133] up against this pillar at this point (indicating on map ‘A’); and Mr. Porter up against this one at this point (indicates).

“Q. To identify them—

“A. Cunningham here (indicating).

“Q. Next to the pillar— A. Marked ‘N. P.’

“Q. And Porter against the pillar marked—

“A. ‘23.’

“Q. The points which were indicated by the men you have just named as being the points where Mr. Cunningham and Mr. Porter were injured?

“A. Yes.

“Q. Now, how far were those points from each of the pillars which you have pointed out on the map?

“A. Why, they were up against each pillar.

(Testimony of George Roper.)

“Q. Right up against each pillar? A. Yes, sir.

“Q. Now, how far were these two positions which were pointed out to you apart?

“A. Not to exceed eight feet.

“Q. Not to exceed eight feet? A. No.”

Q. Will you state to the Court and jury the duty of the miners employed in the Keane Wonder Mine—what their duties were?

“A. Well, the men designated as miners, that was the machine-men, their duty was for to get them cleaned out, and if there was any loose above them, their first duty was to look at that, and then get the machine up as quick as possible, and then run the machine all day.”

“A. Well, if there was a little loose stuff above the roof, of course they would pick it down, and make it safe for themselves, and when they got their own place safe they would set their machine up, and go ahead and drill.”

“A. Any place they was working in, it made no difference where it was, it was a man’s duty to see that it was safe over his head—that is, any miner’s duty.

“Q. Was there any reason, and is there any reason existing, why it became and was the duty of the miners and machine-men employed by the Keane Wonder Mining Company to devote as much time of their shift as possible in their particular line of work? A. Yes, certainly there was a reason.”

“Mr. JARMAN.—Q. Will you state to the Court and jury those reasons, what they were at that time?

(Testimony of George Roper.)

“A. Well, in the first place, at 7:15 we started the compressor going, and that used to cost us about twenty-five dollars a day for fuel alone, to run it; therefore it became absolutely [134] necessary, as soon as ever the air came up, got up to the mine, we tried for to get all of the machines set up, so we could start work right away; I expected every machine to be started and running; some of them didn't get started, but I always looked for them to be running at half-past seven of a morning.”

A good man right there could set up a machine and be ready for work in from twenty to thirty minutes. The reason for the cost of running the compressor at this time was, our distillate at that time used to cost about twenty-three to twenty-five cents a gallon, by the time that was delivered into Death Valley. By wagon road the mine is twenty-eight miles from transportation. We have paid as high as two cents per pound for wagon transportation; at that particular time I think we got it for about a cent and three-quarters. At that time we had five machines in the mine; but I didn't always run the five. When Mr. Cunningham was injured there were three machines running in that mine and one over on the Whip Saw. After the ore was taken out of the mine it was sent down the tramway to the mill, and crushed. The Keane Wonder Mining Company operated a mill in conjunction with this mine at that time. The ore that was taken out was transported to the mill. At the beginning of the month, after we put new shoes and dies on, we would crush a hundred tons a day;

(Testimony of George Roper.)

and at the latter part of the month, when the shoes began to wear out a little, we have gone down as low as eighty tons a day.

About the time of the injury to the plaintiff, the quantity of ore that was necessary to be transported to the mill was possibly ninety tons, or ninety-five.

Cross-examination by Mr. MILLER.

Q. "I wish you would step to the blackboard for a moment. Directing your attention to Defendant's Exhibit 'B,' I wish you would take this ruler, and give me the distance between the two wavy lines of the yellow ore body, between the perpendicular line 500 and the perpendicular line 600, at a point which I will mark '1'—give the distance between those two wavy lines. [135]

"A. Well, it shows a half inch on the ruler.

"Q. A half inch on the ruler; very good. Now, directing your attention to Defendant's Exhibit 'A,' I wish you would take the ruler, and give us the distance from the point of the switch, where the switch leaves the main track, or car-track, to the chute?

(Witness measures on map 'A.')

"A. Now, do I understand this—is this here the chute that goes down the upraise?

"Q. Yes, that is the chute from which this ore was carried down. From the edge of the chute—which is the length of the track—to the point where the switch leaves the main track?

"A. Four inches and a half."

"Q. Now, I would like you to take the distance on

(Testimony of George Roper.)

the ruler from the point of the switch to the end of the switch-track—this labelled 'switch-track,' you see, from the point of the switch to the end of the switch-track.

"A. (After measuring.) That is one and one-quarter inches there.

"The COURT.—Which track?

"A. That is the track straight in.

"Q. It is not the one Mr. Wilson put in?

"Mr. MILLER.—No, not the one Mr. Wilson put in.

"Q. Now, will you measure the distance on the ruler between the nearest edges of pillar '23' and pillar 'N. P.'? A. The nearest points?

"Q. Yes.

"A. (Measures.) Well, it is five-eighths of an inch.

"Q. Now, will you measure the distance, giving the ruler figures, between the point marked 'Car,' and the switch where the switch-track joins the main track, between the car and the switch point, where it joins the main track? (Witness measures.)

"A. Three and a quarter inches.

"Q. Now, will you give us the distance on the ruler between the end of the track marked 'Switch' and the figures 'M. X.'?

"A. (Measuring.) Two inches."

"Q. I don't desire to have that marked, unless counsel wishes it; that is immaterial. I will ask you to state if on the 9th day of December, 1911, there was any other car-track running down to any other

(Testimony of George Roper.)

chute than the one which is now shown on the map.

“A. Not at that time; no, sir.

“Q. Not at that time? A. No, sir.

“Q. Was there any other chute at that time, other than the one which is marked on the map, to which the track [136] is running? A. Yes, sir.

“Q. Where was it? Please indicate it on the map.

“A. Well, directly up above this here; that must have been about there (indicates).

“(Witness marks the point ‘Chute-2’ on map ‘A.’)

“Q. Was there any car-track running to chute-2?

“A. There was a car-track, but there was no car there.

“Q. What direction did the car-track run from the chute-2?

“A. Into this section here. (Indicates.)

“Q. Into the pickey-poke part?

“A. The lower part of the pickey-poke; in this side of the other ridge there.

“Q. Was there any other chute from that entire level on the 9th day of December, 1911, other than the two that are now marked on the map?

“A. No, sir.

“Q. Is it not a fact that on the 9th day of December, 1911, there was a car-track running from this track here indicated, running through the first chute, which took the muck away from the point marked on the map ‘P. X.’? A. No.

“Q. You will please take the ruler now, and measure the distance on the ruler, the nearest distance between the fact of the ore body at ‘P. X.’ and the

(Testimony of George Roper.)

track that is indicated.

“A. The nearest face to the ore body?

“Q. The nearest face marked ‘P. X.’ to the nearest point on the track.

“A. (After measuring.) One and three-quarter inches.

“Q. Mr. Roper, will you examine that map and tell what the scale is? Map ‘A.’

“A. Why, it looks as though it is twenty feet to the inch.

“Mr. MILLER.—Q. Then one and three-quarter inches would be thirty-five feet, would it not?

“A. That is what it would be.

“Q. Then if there was muck taken down at the point marked ‘P. X,’ and the track was thirty-five feet away, the muckers would have to pack that thirty-five feet, wouldn’t they?

“A. Ah, but that track wasn’t thirty-five feet away.

“Q. Then the map is not correct, is it?

“A. No, sir, that track should be right up to the face.

“Q. That is what I wanted to get at a long while ago. Then this track marked ‘Switch’ is not accurately placed on this map, is it?

“A. No, sir, it is not.

“Q. As a matter of fact, it did run more to the right, up to the point marked ‘P. X’?

“A. No, it ought to run up to this point, that was run along to this side; here is where I was working at that time; I was after this body of ore (indicating

(Testimony of George Roper.)

on map); this track ran alongside—this is all solid ore—that track ran up [137] alongside right in that direction (indicates). This track ran up to this point at that time.

“Q. This point is marked on the map ‘M. X.’ If that be the fact, there was no machine, and no work being done at ‘P. X.’ on December 9th, was there?

“A. No, sir, there was not.

“Mr. MILLER.—Q. I want to direct your attention to this track that is marked ‘W,’ coming from the main track between the pillars, and ask you to examine it carefully first. Now, I will ask you to state whether that track as shown there, track ‘W,’ is a correct representation of that track?

“A. Well, the track came through between those pillars, came over here to this place here (indicates.)

“Q. Then the map does not show the whole length of that track, does it? A. No.

“Q. You stated, Mr. Roper, on direct examination, that you had full charge of the Keane Wonder Mine during the time you were foreman, and of the men? A. Yes, sir.

“Q. Did you have any assistant foreman or shift-boss?

“A. Well, not just at that time, I didn’t have any.

“Q. You mean on the 9th of December, 1911?

“A. Yes.

“Q. Did you work a night shift at that time?

“A. Yes, sir.

“Q. How many men did you work on night shift?

“A. Four men.

(Testimony of George Roper.)

“Q. What were their duties?

“A. Mucking.

“Q. No machine-men on the night shift?

“A. No, sir.

“Q. You have stated on your direct testimony, Mr. Roper, that the machine-men had to set up their machines quick, and that it took about twenty minutes or such a matter, for a machine-man to set up?

“A. Yes.

“Q. And I understood you to say that the machine-man's duty was to pick or bar down whatever loose stuff there was, before he set up his machine?

“A. Right over his own head, certainly. On those piston machines we used the post with the arm on it,—the perpendicular bar. We never set those piston machines on a horizontal bar, in that level.

“Q. And the machine-men had to pick down over his head, and I presume he had to pick down the face where he was to drill, to get a free place to drill against, didn't he? A. Certainly.

“Q. And he had to make a firm place to set his bar? A. Certainly.

“Q. And he cleared out a little place for himself to stand, didn't he?

“A. Well, the reason that I had muckers mucking of a night was to do that work, and clean up—always had a clean place to set up; of course when the machine-man went, he would take [138] and sound on the roof above him, and if there was any loose, he would tear it down; and he would do that for his

(Testimony of George Roper.)

own protection; and if he thought there was any loose in the face, he would pick it down, but as a rule that was all done before he went there.

“Q. You mean you instructed the night muckers to clear out a place at the face?

“A. Yes, as a rule that is always done.

“Q. You say the machine-man would sound to see if there were any loose slabs, or anything?

“A. Certainly.

“Q. And if there was a slab that looked as if it was loose, and he sounded it, would that always sound drummy? A. It would if it was loose.

“Q. It would if it was loose? A. Yes.

“Q. No matter how thick it was?

“A. Well, you might get rock maybe fifty feet thick, you know, and if it was it would not sound drummy, it would be too thick; but anything up to the medium thickness, less than five or six feet, it will sound drummy; if it is loose you can always tell.

“Q. And how far from the car-track do you say the nearest side of your proposed false pillar was?

“A. Well, those posts are put in, none of them within a foot of the track.

“Q. None within a foot?

“A. No, a foot to eighteen inches from the track.

“Q. What men put in those stulls and lagging, if you know?

“A. Why, I believe Mr. Perez put in pretty near every one of them, and whoever was his partner at the time; he always had a partner. I gave him his partner. That partner would be a mucker, too, like

(Testimony of George Roper.)

Mr. Perez. Mr. Perez was hired as a mucker; his wages were four dollars a day. I had no timber-man in that mine. If I had a regular timber-man I would pay him the same as a miner, that is, four dollars and a half a day.

"I don't remember, of my own personal knowledge, what day of the month, or what day of the week, this cave occurred. I remember that it was the month of December, of my own independent personal knowledge. I was in the blacksmith-shop at the time this cave occurred. I heard the crash.

"Q. At the time you went in in the evening about 7 o'clock, how long did you stay on that level?

"A. Oh, I possibly was in the mine fifteen or twenty minutes.

"Q. Were any muckers working that night?

"A. There was nobody working that night.

"Q. Nobody at all? A. No."

At that time we had to get out about ninety or ninety-five tons daily in [139] order to keep the mill running.

"Q. And, as a matter of fact, you mucked out pretty clean, didn't you, in order to get that muck ore?

"A. No, I always had a few hundred tons they were working on. Always had a few hundred tons of ore broken down ahead. On the 9th of December, 1911, we had lots of ore broken down ahead, scattered around in different places. The machines would go on ahead of that muck.

"Q. And then when you were mucking, you didn't

(Testimony of George Roper.)

muck close up to the machines, but you would muck on the reserve ore somewhat, wouldn't you?

"A. Well, I can describe exactly with some books, if you will allow me to do it, just how I did it.

"Q. Yes, I will allow you.

"A. Now, I would have a machine set up one day, and shoot this part (illustrating with books); and then the next day would shoot this off; and then the next day he would come back here; and then the next day back here, the same; and keep going around, all around those; and then when I would get where I was going to leave a pillar, I would cut through and leave the pillar; so I always had the muckers working a little away from the machine-man; and they would swing that track around for to keep up, so as they would keep the dirt close to them, but always kept it up to the face; and we had short rails there, eight feet in length, and when there was room to put an eight-foot rail in, they would put it in; and if there was room for a sixteen-foot rail, they would take the eight-foot out, and put the sixteen in; that was the mucker's duty; but when there was switches, or anything like that, I put them in myself.

"Q. So the muckers did not follow the machines closely, but were behind them on the face?

"A. Always near enough to make a clean place; and that is the reason it always gave a clean place for the machine-men to set up.

"Q. What was the distance, approximately, Mr. Roper, from the blacksmith-shop, through the nearest way you could go in through the mine, to the

(Testimony of George Roper.)

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"Q. What was the distance, approximately, Mr. Roper, from the blacksmith-shop, through the nearest way you could go in through the mine, to the

(Testimony of George Roper.)

place where the cave occurred?

“A. Thirty feet.

“Q. From the blacksmith-shop clear in to where the cave occurred, by the nearest route you could follow, what was the distance?

“A. By the regular way, down the steps, was the nearest way; there was another way by going around by the old pickey-poke. [140] It would be, possibly, six hundred feet.

“Q. And they went off shift when?

“A. Whenever the shooting time was; either four-thirty or five o'clock, I don't just remember; four-thirty, I believe. They worked eight-hour shifts.

“Q. Now, I understood you to say in answer to a question of Mr. Jarman's, there never had been any caving in that level before?

“A. Not in the level before, no, sir; not during the time that I was there.

“Q. Well, that is what I refer to, to your knowledge. A. Yes.

“Q. And how long were you there before December 9th, 1911?

“A. Oh, possibly ten or eleven months.

“Q. Ten or eleven months; during that ten or eleven months do you know of any slabs having fallen off or sloughed off the hanging-wall anywhere on that level?

“A. Well, I pulled several of them down; those were the only ones we barred down.

“Q. Do you know of any having sloughed off, without having been helped with human agency?

(Testimony of George Roper.)

“A. No.

“Q. Nothing at all.

“Q. You were thoroughly familiar with everything that happened in that stope during that ten or eleven months, weren't you? A. I was.

“The general system we pursued was stoping out up to the galena seam and then using the Waugh drills and breaking down the remainder. On one occasion I broke down at least 1,500 tons at one round of shots, but generally not as much as that.”

Q. Now, during the ten or eleven months you were foreman, and thoroughly familiar with the work going on in that level of the mine, do you ever remember, or was there ever any ore left on the hanging-wall after the use of the Waugh drills—after the Waugh drills had been used?

A. No, we took it all down if we could, if possible.

Q. In each and every instance when you shot the holes drilled by the Waugh drills in an ore-body above the seam, and hanging upon the hanging-wall, did those shots in every instance during that ten or eleven months break clean all the ore from the hanging-wall? A. Good Lord, no.

Q. As a matter of fact, then, after the shooting of the holes drilled by the Waugh drills, there would be ore bodies remaining, unbroken, from the hanging-wall at times? A. At times, yes.

Q. And those you got down by barring?

A. By barring, yes. [141]

Q. And if the ore was not of very high grade at that point, and the amount of ore remaining upon

(Testimony of George Roper.)

the hanging-wall was not large in quantity, did you always go to the pains of getting that down?

A. Always got it down. We didn't always get it down immediately after we had shot the holes drilled by the Waugh drills; sometimes we would have to drill them again. Wherever the Waugh drills had been shot, the muckers that went on night shift would bar all down that was possible to bar down.

"Q. Now, was it or was it not your practice to draw pillars wherever you could do so?

"A. To do what?"

"Q. To draw the pillars wherever you could do so."

"A. Well, it would have been but I never did draw any of them."

"Q. You never did draw any of them?"

"A. No—I will take that back; I did draw one pillar in the pickey-poke."

"Q. And did you not as a matter of fact reduce the size of some pillars after you advanced a considerable ways beyond them?"

"A. Yes, two or three pillars I took them down."

I did draw one pillar in the pickey-poke. I reduced the size of two or three pillars, after I advanced a considerable ways beyond them. Mr. Grimini tells me that the two pillars near the point of caving are there now, and he had just come from there a week or so. I have not been there since March, 1912. The distance between the foot and hanging-wall at the point of caving was 13 feet 4 inches. I measured it at that time, and they say there

(Testimony of George Roper.)

is no more fell down than there was at that time. On that level, right there at that point, twelve-foot stulls they used. The longest stull I used was on that pickey-poke; I put a stull in there one time fifteen feet ten inches long. I never blocked them up from the bottom; you dig a little hole in the bottom, if possible, for to keep the bottom from moving, and then put a head-board on. As a rule we used 6 by 6 for head-board. We put in the wedging on top of that. It would require thirteen cubic feet of the schist hanging-wall to make a ton. I believe that twelve cubic feet of that quartz ore would make a ton. The first time I remember having seen Mr. Cunningham on the 9th day of December, 1911, inside the mine, would be the first time I went in, about five or ten minutes past seven in the morning. I gave Mr. Cunningham no instructions as to his work [142] at that time. The next time I saw Mr. Cunningham,—would be about 8:30 or 9 o'clock. That was my regular time for making my rounds; I would see him every time I went around. He would be at his work there at that time, certainly. I could not swear that I saw him, but if he had not been there I would have made inquiries where he was, and there would have had to have been some explanation, because, if I found a man away from his duty, I never give them a chance to find them the second time.

“Q. You would can him, wouldn't you?

“A. I did.”

The last time I was in the mine I remember of seeing Mr. Cunningham. That was just as I left him

(Testimony of George Roper.)

to go over to Mr. Porter's place. I showed Mr. Cunningham and Mr. Perez a certain pile of ore to car, and one was on one side of the track, and one on the other. At that particular point at that time, the ore laid on both sides of the track. This here track was up in here; here is where the other two men was working; Mr. Cunningham and Mr. Perez came through this here pillar here (indicates), and here is where they were working.

"Q. Will you indicate on the map by the words 'Car-2,' where the other car would be loaded?

"A. There (indicates, and marks point 'Car-2')."

I used to go in the level from six to ten times every day. The day of the cave, I was in that level just my regular custom, same as any other day. As a rule I made one or two trips a day over to the Whip Saw; it is half a mile from the other place.

"Q. Now, what day was it that you tried to bar down the slab at the place of the cave?

"A. Well, it was just about two days before it fell down.

"Q. Two days before? A. Yes, sir.

"Q. Did someone call your attention to it at that time? A. Yes.

"Q. Who? A. Mr. Perez.

"Q. What was the distance from the outer edge of the muck that fell in the cave to the nearest face of ore, other than the pillar '23' or 'NP'?

"A. Well, at that time not fifteen feet.

"Q. Not fifteen feet? A. No.

"Q. Was it as much as ten feet? A. Oh, yes."

(Testimony of George Roper.)

All the accessories to the machines were kept out there at my office. Nothing whatever was kept in the mine. No bolts; no nuts; nothing that attached to or applied to the machine was kept in the mine. The bolts was kept in the blacksmith-shop; all the other material was kept in the office. [143] When the machine is in place there are no repairs of any kind belonging to the machines kept in the mine, because there was no place to put them; and they are expensive, and have to be taken care of. If a man broke a bolt he would have to go out to my office to get another,—about six hundred feet away from the stope.

There was no ore being carried to any other chute than the one here indicated, on the 9th of December, 1911. No ore had been taken to any other chute on December 8th,—not for a month or more before that. There was no other ore broken down at any place on that level on the 9th of December, except along this face I have described, and as having the machines at work. There was no ore broken down from any of these pillars. There was no ore dumped into the chute at the end of the main track on the 9th of December, 1911, that did not come from the face of the ore body, up here where the machines were placed.

“Q. Then I understand you to say that the caved stuff covered both tracks?

“A. Oh, yes, it came right down on the switch.

“Q. Right down on the switch? A. Yes, sir.

“Q. What size were those cars, Mr. Roper?

(Testimony of George Roper.)

“A. Twelve hundred and fifty pounds.”

They are made out of steel, about—possibly three-eighths. One of them is a Truax car. One man would take about ten tons of muck out in eight hours; four men would take out about forty tons. We kept the rails for the track on the level in the mine; they were all over the mine. They were laid on cross-ties; the cross-ties were kept around the mine, too. They were fastened with fish-plates. They were fastened to the cross-ties with spikes; and they were kept around the mine too. My general instructions to the muckers were to put in a length of rails whenever they made room for it. They did that whether I was there or not.

“Q. I would like to have you particularly look at the position of pillar ‘23’ and pillar ‘NP,’ and I call your attention to track ‘W,’ the ‘switch-track,’ and the place marked ‘NX,’ and the place marked ‘PX’ on the map, and I will ask you to state whether the position of the pillars ‘23’ and ‘NP’ is correctly designated and placed on that map ‘A’?”

“A. Yes, those pillars belong just about where they are.

“Q. Just about where they are?”

“A. Yes, sir.” [144]

Redirect Examination of Mr. GEORGE ROPER by
Mr. JARMAN.

“Q. Mr. Roper, will you explain what you meant when you answered that there was, in your judgment, twelve cubic feet of ore to a ton?”

“A. Well, in place—before it is shot down. It is

(Testimony of George Roper.)

the same as to the schist; in place, not the stuff broken down,—about thirteen cubic feet to a ton. In a straight line the distance from the point of the cave to the blacksmith-shop, or the place that we kept the supplies, just outside the entrance to the tunnel, would be about three hundred feet. I knew there had been a cave; if a ton of dirt fell down, and you were any way in or around, or near the mine, you could hear it. I could hear it from the position I was.

“Q. Please state for our benefit when the ore, or rock, or whatever the material was that fell down in this cave, and struck the floor below, what happened?

“A. Well, it fell down, and the largest lumps of course just rolled over.

“Q. Where did they roll to?

“A. Well, the large lump that caught Mr. Cunningham rolled over and pinned him up against the pillar—caught his leg and pinned him up against the pillar.

“Q. Did you see that large lump? A. Yes, sir.

“Q. And directing your attention to the dotted line extending from the switch in a northeasterly direction what does that dotted line represent?

“A. I do not know.”

“Q. Did you ever remove that large lump?

“A. The next morning.

“Q. Do you know what the effect would have been if that lump of rock had struck a man who was directly beneath it?

“A. Broke every bone in his body.”

[Testimony of Edmund Grimani, for Defendant.]

Mr. EDMUND GRIMANI, called as a witness on behalf of the defendant, after being sworn, testified as follows:

Direct Examination by Mr. JARMAN.

My business is a miner; have been in that business about twelve years, I started in 1902. At the present time I am employed at the Keane Wonder Mine, as foreman. I succeeded Mr. Wren. I have worked at the Keane Wonder Mine three years and have been foreman about one year. The [145] first time I started in a mine was in the Langlotte in South Africa. I started in to learn a machine in that mine. I worked three months as an apprentice on the machine, then went to the Mine Inspector's, and passed an examination to get a certificate to run a machine. I got the certificate. I worked at that same mine about one year. After that I worked in several mines along that Rand, along that same district. Since I started mining and obtained a certificate I have been in the same business, machine-man, ever since. I have also worked in the L. S. & P. mine at Bisbee, Arizona. I worked there eighteen months as machine-man. After leaving that mine I went to Tonopah and worked in the Belmont Mine, as machine-man. I worked there thirty-five shifts. Then I went prospecting and after that came to the Keane Wonder Mine. I have remained there ever since and now in the employ of the company. On the day the plaintiff Mr. Cunningham was injured, I was not at the Keane Wonder Mine. I

(Testimony of Edmund Grimani.)

know Mr. Cunningham. At that time I was on a vacation. I quit on November 4th, on which day I was running a machine in said mine. I had been running a machine continuously in that mine eleven months prior to that time.

Q. I will ask you, Mr. Grimani, to step down and examine this map "A," which purports to be a floor plan of the Keane Wonder Mine as it was on or about the 9th day of December, 1911.

Mr. JARMAN.—Why, certainly.

Q. Were you familiar with those conditions at that time, November 14th?

A. With the place that I worked in, yes.

The place that I worked, or quit working on November 14th, the nearest I could come to it, I think I had started to cut that pillar (indicates). The pillar marked "23." I started to cut that pillar—this one here (indicates). The pillar marked "NP" was already cut. There was a track between the pillar "NP" and the place marked "23" at which I was at work at that time. I had been running a machine at this place (indicating on map); right there; that was when I quit, but I worked all through this country here, took out lots of this ground.

"Q. Who, if anybody that you know, worked a machine in the place between pillar 'NP' and the pillar marked '23'?

"A. Well, I could not say. I might have worked there myself, but I could not state whether I actually worked in that place. [146]

"Mr. MILLER.—I desire at this time to have the

(Testimony of Edmund Grimani.)

point where he says he last worked, marked.

“The WITNESS.—Marked ‘23’ pillar.”

“Mr. JARMAN.—Well, we will mark it ‘G.’ Indicating the end of pillar ‘23’ by the letter ‘G.’ (The point indicated by the witness is marked with the letter ‘G’ on map ‘A.’)”

I was absent from that mine on my vacation about four months. I returned to work March 16th.

Q. Upon your return to work, have you ever been in that mine at or about the place indicated on the map, near to the pillar which you have just testified to?

“The WITNESS.—You mean where I worked near where the accident occurred?

“Mr. JARMAN.—Yes, sir.

“A. Yes, sir, I did.

“Q. When was the last time you were in that mine? A. The day before I came up here.

“Q. And how long ago was that?

“A. On the 16th of this month.

“Q. That was the day before you left the mine to come here as a witness in this case? A. Yes, sir.

“Q. Did you ever see the place where the cave occurred, which resulted in the injury to the plaintiff in this action? A. Yes, sir.

“Q. Do you know where that place is in the mine?

“A. Yes, sir.

“Q. Will you point it out on this map to the jury?

“A. Right where that cross is (indicating on map ‘A’).

(Testimony of Edmund Grimani.)

“Q. That is the cross near the pillars ‘NP’ and ‘23’? A. Yes.

“Q. Now, how can you tell that was the place of your own knowledge?

“A. I went down and measured it all up the day before I came here, along with Mr. Wilson; that is, measured the distance between them pillars.”

I always studied the roof when I got to work.

“Q. I mean whether you had studied that particular point of this accident? A. Yes, sir.

“Q. Did you observe that some ore had fallen there from the roof?

“A. No indication to show whether any one had fallen; the roof at the present time is just a smooth body of schist.

“Q. Now, when you left there was the roof at that point a smooth body of schist? A. No, sir.

“Q. What was there? A. Ore.

“Q. What is that?

“A. Ore; we hadn’t advanced to that point at that time, when I left.

“Q. What do you mean when you say you had not advanced to that point?

“A. Well, the face had not advanced that far; it was virgin ground at that time; we were within; must have been about [147] eight or ten feet, I should say, of that place.”

The ground I was working on at that time I quit was hard quartz. It was pretty hard-breaking ground, in fact it was ground that you could not make no headway without a machine; you had to get

(Testimony of Edmund Grimani.)

a machine to work; pretty tough breaking ground; you had to have holes pretty close together, that is, about eighteen inches, from that to two feet, in order to get a good show to break. I operated a piston machine. I took out the lower part, about six and a half to seven feet.

“Q. Did you work on the ore above what you took out? A. Not on the ore above, no, sir.

“Q. How far would you continue working in the ore body with your piston machine with the ore remaining over your head?

“A. Oh, there was no specified distance.

“Q. Did you ever continue your work with that ore overhead?

“A. Well, we used sometimes a Waugh machine, it would come along, might be twenty or fifty feet farther away, but we were working always at the ore above our head.

“Q. But the piston man always had this ore about his head? A. Yes.

“Q. Now, why didn't that ore fall down of its own weight?

“A. Well, it was pretty solid ground, there was no show for it to fall down.

“Q. Could you bar it down? A. No, sir.

“Q. How did the Keane Wonder Mining Company get that ore down? A. By a Waugh machine.

“Q. By a Waugh machine, you mean by drilling holes in it? A. Drilling holes in it.

“Q. And loading the holes? A. Yes, sir.

“Q. And shooting it down? A. Yes, sir.”

(Testimony of Edmund Grimani.)

There was pillars and stulls in there, that is all there was, about the place pointed out to me on this map. I know where the chute is. It is where they dump the ore on the car-track, which you pointed out to me on the map.

“Q. Now, can you state to the jury whether or not there are any pillars or stulls between that chute and the pillar designated ‘NP’ on this map?

“The COURT.—Do you propose to prove the condition on November 14th?

“Mr. JARMAN.—Yes, sir; to show they were there then, and are there now.

“The COURT.—The same ones?

“Mr. JARMAN.—The same ones.

“The COURT.—Very well, go on. (By direction the reporter reads the question.)

“A. There are some there at the present day—stulls and pillars.” [148] These pillars here are in the mine at the present time (indicates on map).

The COURT.—On the 14th of November, when you were there, the points indicated to be pillars, were solid ground?

“A. Not down here (indicates on map); these were taken out.

“Q. How did those pillars get there, then?

“A. They were cut there.

“Q. Was there any solid ground when you were there on the 14th of November?

“A. Along up here (indicates); I had worked this ground out myself on the machine.

“Q. Did you leave those pillars there when you

(Testimony of Edmund Grimani.)

worked it out? A. Yes, sir.

“Q. That is what you wanted to say, then.”

The height or distance between the foot-wall and the hanging-wall at about the places indicated on that map by a cross, near the pillars marked “NP” and “23” was about fourteen feet. The average height between the hanging-wall and the foot-wall for some distance around that place was about fourteen feet.

Q. For what distance around that particular point which is indicated on the map will the distance between those walls be about fourteen feet?

A. Oh, within a hundred foot circle.

Within a hundred foot circle around that point there, the distance between the two walls does not exceed fourteen feet. When I go on shift the first thing I do is to have a look at the place I am going to work in.

“A. When I first go on shift, I hunt around, and look overhead, and in fact, I look all around to see how the ground is; then I get in and rig up my machine and drill for the rest of the shift, up till about an hour before quitting time, and then shoot.”

If there is anything on the hanging, or near about there, I pull it down. I am referring to the place I am working in. I do not go to any other place in that mine and pull down any stuff or bar it down. That is done by anyone that is working in the place—each man generally looks after himself; that is, as to the particular place.

“Q. If there is any barring down to be done in

(Testimony of Edmund Grimani.)

any other part of the mine, overhead, where a machine-man is not working, who, if anybody, bars that down?

“A. Any man who goes in there to work.

“Q. Well, suppose there is no machine-man working there, who would do the work?

“A. It don't have to be a machine-man; any person who goes into that place to work, he [149] naturally would look around to see whether there was any dangerous ground, and pull it down.

“Q. Who else besides the machine-men were employed in that mine during the time you were employed there? A. Muckers.

“Q. And what work did the muckers do in the mine? A. Well, they muck the ore out.

“Q. Do they do anything else? A. Yes.

“Q. What?

“A. If there was any track, or stulls, or such things as that to do, they did it.

“Q. Who put up the stulls in that mine?

“A. The muckers.

“Q. Did you ever see any muckers putting up stulls in that mine? A. Yes, sir.”

They get the stulls on the outside of the mine; they was sent up from the mine. Sometimes they were kept out by the blacksmith-shop, and sometimes down below by the tramway, where they came up. I could not say how many stulls I have seen there; there is generally a pile of them out there.

“Q. Do you know what they were intended to be used for? A. Yes.

(Testimony of Edmund Grimani.)

“Q. What? A. To keep up bad ground.

“Q. To keep up bad ground? A. Yes.

“Q. What part, if any, had the muckers to do with keeping up bad ground?

“A. They put them stulls in; that is, if it is necessary for a stull.

“Q. If it was necessary? A. Yes.”

I would not have to prepare any particular space at all when I went on shift to go to work, just room enough to work. I would have to rig up my bar of my machine four feet from the face. I would operate in about five feet of the face, in width; that is, that would be about as much ground as I could drill in one shift. It took me about twenty minutes or half an hour to set up my machine and get to work when I went on shift.

Cross-examination by Mr. MILLER.

I do not know of my own personal knowledge where this cave took place on December 9th, 1911. I had not seen that ground at that particular place since Nov. 14th previous. I did not see it again until March 16th, 1912. The only way I know where this cave took place is because somebody pointed it out. There is nothing on the hanging-wall to indicate where the cave came from. When I saw it in March it was a smooth hanging-wall. The last time I saw it, November 14th, previous to this cave there was ore there. Of my own personal knowledge I don't know anything was done in that [150] mine between November 14th and March 16th. When I set up my machine, the first thing when I went on

(Testimony of Edmund Grimani.)

shift I looked around to see the condition of the ground, then I took a bar or pick and barred or picked down the face, where I was going to drill against. I also picked it down overhead. That was my duty as a miner; then I made a place to set my machine. When I went on shift as a miner and machine-man in the Keane Wonder Mine in 1911, at the time specified, I sometimes went alone to my place of work to do this and sometimes had company. Sometimes I had another person working at the machine along with me in that one place; another machine-man; two machines working in one place. That was all the company or help I had in the matter. I went on shift in the Keane Wonder Mine in 1911, when I worked there, at half-past seven. I went into the tunnel entrance. I went off shift four-thirty. I was supposed to leave the mine and go through the tunnel at four-thirty.

[Testimony of E. W. Williams, for Defendant.]

Mr. E. W. WILLIAMS, called as a witness on behalf of defendant, after being sworn, testified as follows:

Direct Examination by Mr. JARMAN.

My name is E. W. Williams. I have followed mining mostly in the last twelve or fourteen years. I am in the employ of the Keane Wonder Mining Company and was in their employ on or about December 9th, 1911. I was at the mine the day that plaintiff was injured. I know the plaintiff, Mr. Cunningham. I know the place in that mine where the cave took place which resulted in the injury to plaintiff. I

(Testimony of E. W. Williams.)

am familiar with map "A" on the board to a certain extent. That is supposed to be the fourth level. The point where the cave took place on December 9th, 1911, was here (indicates on map). At the point indicated by a cross, near the pillars "23" and "NP." I went into the mine the next morning after the caving, the morning of the 10th, about 7:30. Mr. Roper and several more men went with me. After we got into the mine he showed us first where this cave took place. I found that the mixture of the hanging-wall, there was a little ore in it, not much,—had caved down and rolled over between these two piers, on both the switch and the track. There was about four or five tons, I should judge. There was one pillar on each side of the switch, and then there were stulls on the opposite side of the track, opposite the pillars, toward the chute. They were close to ten or twelve feet through, might have been a little longer [151] one way than the other.

"Q. Did you see any car used in the mining operations in that mine when you went there the next morning?

"A. I saw two cars.

"Q. Two cars? A. Yes.

"Q. Can you tell the jury where you found those cars?

"A. Yes, the cars were quite a little ways from this cave-in.

"Q. How far?

"A. Oh, any way from thirty to fifty feet.

"Q. Can you point out on the map where you saw

(Testimony of E. W. Williams.)

the cars, or found them? A. Yes.

“Q. Will you do so?”

One car was around the switch, what we call the switch, another one up the track, right straight up. The cars was in the opposite direction from the chute—from the cave, they were just about as far, or a little farther in the opposite direction from the cave as the chute was the other way.

“Q. In other words, you mean that the cave was between the chute and the cars?

“A. The cave was between the chute and the cars.

“Q. Now, did you examine those cars?

“A. Only one of them.

“Q. What one did you examine?

“A. The one in the switch.

“Q. Why did you examine that car?

“A. Because all of them went up and looked into it, most of the fellows—Mr. Roper and the rest of them.

“Q. What did you find from examination?

“A. Well, it was one-third to a half full of ore.

“Q. From one-third to a half full of ore?

“A. Yes.

“Q. Do you know of your knowledge who was working on that car on the day previous?”

No, I don't. I am familiar with the character of the ore in the Keane Wonder Mine, to a certain extent, as I worked in it. It is a very hard quartz, solid quartz, about as hard as you find anywhere.

Cross-examination by Mr. MILLER.

I was not in the mine on December 9th, 1911, nor

(Testimony of E. W. Williams.)

the day before. I had never been in there on the fourth level until the morning of the 10th, never been in the mine. I went in with Mr. Roper at his request; he told me to get a single jack. He requested me to go in and get a single jack-hammer; I was working on the outside. My business was not exactly to see where this cave took place, but he showed me while I was in there. I saw a schist and ore pile there, from five to six feet long, it looked like; maybe scattered a little farther than that, some of it, where it had rolled; some of it eight or nine feet. I should judge it was three and a half or four [152] feet wide, possibly eight or nine feet long. Some rocks there might have been twenty-four to thirty inches thick, that is above the floor of the stope; it wasn't in solid rock when I saw it at all. Some of it was twenty-four to thirty inches, some of it was down as low as a half inch. The tracks were not clear at that time. They were not completely covered, some ore on it and some not. I could tell from the look of the track that it had never been mucked away from the track. The switch ran right off of the main track. The switch track, the farthest point it had rock on it, to the corresponding point, straight across, from the main track was three or four feet. Right at that time there was nobody at work there that morning; it was just before going to work, just the time everybody was going on shift. I staid in there probably fifteen minutes. I noted particularly the direction of the tracks because I worked there afterwards. I was to go to work there that day, but he

(Testimony of E. W. Williams.)

wanted me to finish outside first. I am employed there now.

“Q. Did you see any machines in there that day?

“A. Yes, I did; I saw one machine that had not been set up yet, and one machine that the machine wasn’t up, but the bar was.”

Q. As a matter of fact, didn’t this track “W” extend farther to where it is marked, and the pillar “23,” up to where the car is marked?

A. Up in that direction, it did.

Q. Where did you see the car you speak about looking into, and seeing ore in it?

A. We went around between those two pillars, on around past them.

I saw the other car back on the main track, I should judge fifty or sixty feet. It was pretty near north from the cave; not toward the chute, but the other way.

“The COURT.—Q. Mr. Williams, when you examined that pile of debris at the place where the accident is said to have occurred on the morning of the 10th, did you examine it with any care?

“A. Yes, I did, because in a case like that anybody would naturally do it.

“Q. Did you observe whether there was anything in there except schist and ore?

“A. I didn’t see anything there but that schist and ore.

“Q. Did you see any tools there?

“A. No, sir, I did not.

“Q. No car there?

(Testimony of E. W. Williams.)

“A. Not right at that spot, no, sir. [153]

“Q. If there had been any shovel there, would you have seen it?

“A. I think I would if there had been any there.”

None of that pile of muck that had caved from the hanging-wall had been moved when I saw it, that I know of, and none was moved while I was there.

The COURT.—It didn't appear—any of it—to have been moved, did it?

A. No, sir, it didn't appear any of it to have been moved. I am pretty certain of that.

“Mr. JARMAN.—The defendant will rest.”

[Testimony of James Cunningham, for Plaintiff (in Rebuttal).]

Mr. JAMES CUNNINGHAM, called in rebuttal, testified as follows:

“Mr. MILLER.—Q. Mr. Cunningham, I desire you to examine this map, Defendant's Exhibit ‘A,’ and I call your attention to the track marked ‘Car-track,’ running from the chute into the stope; track marked ‘switch,’ and the track marked ‘W,’ and ask you to state whether or not that represents exactly the condition and place of that track on the 9th day of December, 1911.

“A. It does not represent it.

“Q. It does not represent it? A. No.

“Q. Will you state what change could be made in the map where it is marked ‘Switch,’ that part of the track, to make it represent the actual condition on the 9th of December, 1911?

(Testimony of James Cunningham.)

“A. Well, this main track should go up here.

(Indicates.)

“Q. Should go up there.

“A. And this is the switch marked off here, ain’t it?

“Q. Yes.

“A. And them pillars, I don’t understand them—that ain’t the way it looked at that time.

“Mr. MILLER.—Q. At that distance from the switch itself, was it on the 9th of December, 1911, to the place where the car was on the main track, if you know?

“A. Well, the car was on the switch.

“Q. Well, state whether or not there was a car on the main track that day, not on the switch, on the main track.

“A. There was several tracks; what one do you refer to as being the main track?

“Q. The track that you just said should be extended up to the face of that ore?

“A. No, there was no car.

“Q. Is there any other track at that part of the mine than what is represented on the map, now marked Defendant’s Exhibit ‘A’?

“A. In that part of the mine?

“Q. Yes. A. Yes.

“Q. You stated, I think, in your direct examination that there were three machines; state whether or not the muck from the different parts of [154] the face, was loaded or carred out upon one track or two tracks, or three tracks, if you know.

(Testimony of James Cunningham.)

“A. On two tracks.

“Q. Two tracks? A. Two tracks.

“Mr. MOREHOUSE.—I understand that to mean they were carrying out the muck on the two tracks.

“Mr. MILLER.—Yes.”

During the time I was working in the Keane Wonder Mine I never put up or assisted in putting up a stull. I was never instructed or requested by Mr. Roper, or any other person whatsoever in authority, to put up a stull or assist in putting it up.

During the time I worked there as a mucker, I was never informed by Mr. Roper, by John Keith, or by any person in authority, that there were stulls in the mine, or outside the mine and that I was to use them in case I saw a dangerous place in the roof.

“Mr. MILLER.—Plaintiff rests, if your Honor please.”

Wednesday, November 26th, 1913.

Court convened 9 A. M. (All parties present.)

“Mr. JARMAN.—After hearing all the evidence in the case, and after a full and further consideration of the law involved, we desire to renew our motion previously made, upon the second and fourth grounds thereof, which were stated to your Honor the other day, and upon those grounds alone is the motion made at this time. I have the reporter's transcript of the motion made the other day, showing the second and fourth grounds, and counsel being familiar with it, it may be considered that the motion is made upon those grounds, without stating them if that is satisfactory?

“Mr. MILLER.—It may be made upon those grounds.

“The COURT.—It will be the same ruling and the same exception.”

[Instructions of Court to Jury.]

“The COURT.—Gentlemen, you will now listen to the instructions. The defendant and the plaintiff here are master and servant. From this relation spring certain reciprocal and mutual duties. We are concerned here only with those duties which are alleged to have been violated. The plaintiff in his complaint is expected to state his cause of action fully. He has alleged that he was injured while at work in the Keane Wonder Mine in [155] the line of his duties; that the injury was caused by the caving of a slab of ore and rock from the roof of the stope in which he was at work, and that this was all the result of the defendant's failure to perform the duty which it owed to him.

“Plaintiff avers that the defendant failed to furnish him a reasonably safe place to work, and safe appliances, ways and tools, in this, that it negligently failed to properly support the roof of the stope; that it negligently failed to pick and bar down the loose rock and ore from the roof of the stope, and that it neglected and failed to properly inspect and examine the roof of the stope. This is the negligence which is specifically charged against the defendant.

“If the plaintiff fails to prove the negligence so charged, he cannot recover. He must recover on the case as he has laid it. He cannot recover for an act of negligence which he has not charged. Conse-

(Testimony of James Cunningham.)

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“Q. Two tracks? A. Two tracks.

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“If the plaintiff fails to prove the negligence so charged, he cannot recover. He must recover on the case as he has laid it. He cannot recover for an act of negligence which he has not charged. Conse-

quently in your deliberations, you will consider the bearing of the testimony on these questions. Did the defendant fail to exercise reasonable care—that is, the care which an ordinarily prudent man engaged in the same business would have exercised under the conditions which prevailed at the time of the accident in the Keane Wonder Mine; to support the roof of the stope, to inspect and examine the roof, and to pick and bar down the loose rock and ore.

“You cannot infer from the fact that a man has been injured that someone must pay for it. It is not the law that every injury must be compensated. In every case of this kind the inquiry must be as to whether the injury was the direct result of the fault, neglect, or carelessness of someone who ought to be held responsible. This is the important question before you. You must determine it regardless of any sympathy which may be excited by the condition of the plaintiff, or by the fact that the defendant is a corporation. You are to determine the issues here presented without prejudice or bias, as honest, impartial men, sworn to try the case according to the law and the evidence, and a true verdict render.

“Neither from the mere falling of the rock, standing alone, can you find the defendant is liable. The defendant is not liable unless it was negligent in the manner alleged in the complaint, and such negligence must be shown by [156] the testimony to have been the direct and proximate cause of the injury.

“Negligence consists in the omission to do something which a reasonably prudent man, guided by those considerations which ordinarily regulate the

conduct of human affairs, would do ; or in doing something which an ordinarily prudent man would not do under the circumstances.

“The question of negligence is to be determined in all cases by reference to the situation and knowledge of the parties, and all of the attendant conditions which are disclosed in the testimony.

“In this case the defendant is guilty of such negligence if it is shown by a preponderance of the evidence that it failed to exercise that degree of care in the inspection and examination, and the frequent inspection and examination, of the roof of the stope ; in the picking and barring down of loose rock and ore therefrom ; and in the placing of proper stulls and supports which an ordinarily prudent miner would have exercised under the circumstances and conditions which prevailed in the Keane Wonder Mine at that time ; and for this reason and in these respects, failed to furnish plaintiff with a reasonably safe place within which to work.

“A large number of requests for instructions have been presented to me. I have selected those which seem to me to have a bearing, and others, which I will not read, will be given in substance in the general instructions. I do this largely because I do not wish to take up too much time, and, while they may occupy some time in the reading, I think owing to the importance of the case, you ought to be fully instructed, even though there will be some repetition, and I hope you will bear with me.

“The duty of inspection is affirmative, and it must be continuously fulfilled and positively performed.

In ascertaining whether this has been done or not, the character of the business should be considered; that is, you should consider what, under those conditions, the ordinarily prudent miner, in such a mine at that time, would have done.

“The Keane Wonder Mining Company is not a guarantor of the safety of its mine as a place for its employees to work while engaged in the line of their duty or in the course of their employment; that is, it is not bound to secure the absolute safety of its employees while so engaged in the mine, [157] but it is only bound to exercise such ordinary and reasonable care for the safety of its employees while so engaged, or in the mine, as an ordinarily prudent man engaged in the same business would use under like circumstances.

“That instruction I have already given in substance.

“If you find from the evidence that the proof establishes nothing more than a mere accident which resulted in an injury to the plaintiff, then I instruct you that the plaintiff cannot recover, and your verdict should be for the defendant.

“In an action by an employee against his employer, I instruct you also that in the absence of evidence to the contrary, it will be presumed that the methods of work adopted by the latter are proper and sufficient. If you find that the plaintiff has not proven and established to your satisfaction by a preponderance of the evidence that the methods of operation adopted and used by the defendant at its mine were insufficient, or were improper, then you cannot find

in this respect, that the defendant was negligent. The effect of this is simply in line with the general instruction that the burden rests upon the plaintiff to establish his case by a preponderance of the evidence. There is no presumption that the defendant is guilty of negligence, but it must be established by the proof that its methods were insufficient or improper.

“You are further instructed that it was the duty of the defendant here to provide a reasonably safe place for plaintiff to work during the time he was a hired workman in the employ of the defendant, and while he was engaged in the line of his employment.

“An employer will generally discharge himself from the imputation of want of ordinary and reasonable care, by adopting and using such methods of work as are common among miners under like circumstances, and he will not be liable in damages for an injury to an employee caused by the falling of rock or ore from the hanging-wall or roof where he has made ordinary and reasonable inspection and tests—such tests, and such frequent tests, as would be made by prudent miners under like conditions. If after an inspection, the work presents every appearance of being reasonably sound and safe, and its defective appearance is liable to mislead or escape the careful observer, this should be taken into consideration, and in weighing the testimony, you [158] may consider the fact, if it be a fact, that like conditions have long existed in the mine where the accident occurred, and that no accident had theretofore taken place, or any caving occurred. In

order, therefore, to charge the defendant with negligence in this case because of the falling of rock or other materials from the roof or hanging-wall, plaintiff must prove by a preponderance of the evidence that the defendant had previous knowledge of such defective or dangerous condition of the roof or hanging-wall, or that, by the exercise of reasonable care and inspection, the defendant could have discovered such a defective or dangerous condition; and if you find that the defendant did exercise ordinary and reasonable care, such as is required under these circumstances, then it would be excused.

“You are instructed that the plaintiff while in the employ of the defendant, and engaged in the line of his employment, had a right to take it for granted that the defendant had performed its duty in furnishing a safe place for work, until he was warned or notified of a danger arising from negligence, or until the danger became so obvious that a reasonably prudent workman under the circumstances, would observe it.

“The care which is required of a mining company and of a master under such circumstances, depends upon the conditions; the more dangerous the conditions, the greater the degree of care required. Ordinary care under some circumstances, would not be the ordinary care under more dangerous conditions.

“The injury complained of occurred in the State of California, consequently we are governed by the law of that commonwealth in the particulars which I shall indicate. Formerly in California it was the law that the employee assumes the ordinary risks of

his employment, and that he could not recover if he were himself guilty of contributory negligence, which negligence directly caused or contributed to cause the injury, or if the injury was the result of the negligence of a fellow-servant. This has been changed by the statute of that State. Now, in any action to recover damages for personal injury sustained in California by an employee while engaged in the line of his duty or in the course of his employment, on the ground of the want of ordinary or reasonable care of the employer, or of any officer, agent, or [159] servant of the employer, it shall not be a defense that the employee, either expressly or impliedly, assumed the risk or hazard complained of, or that the injury was caused in whole or in part by the want of ordinary or reasonable care of a fellow-servant. Furthermore, the fact that such employee himself may have been guilty of contributory negligence, shall not bar a recovery therein, where his contributory negligence was slight and that of the employer was gross in comparison, but the damages may be diminished by the jury in proportion to the amount of negligence attributable to such employee.

“If you find from the evidence that said injury to plaintiff resulted from contributory negligence on the part of the plaintiff, and that no negligence is proven or established on the part of the defendant, or that the negligence on the part of the defendant, if any, is not gross in comparison with the negligence established on the part of the plaintiff, then I instruct you that if the plaintiff is guilty of contributory neg-

ligence which is more than slight negligence, he cannot recover.

“If you find from the evidence that the plaintiff is entitled to recover, as alleged in his complaint, then in estimating the plaintiff’s damages, you may take into consideration his health and physical condition prior to the injury, also his health and physical condition since then, if you believe from the evidence that his health and physical condition since then is impaired as the result of such injury; and you may also consider whether or not he has been permanently injured, and to what extent; and also to what extent, if any, he may have endured physical suffering as the natural and inevitable result of such injury; and also any necessary expense he may have been put to in and about caring for himself, and curing himself, and the value of any time you may believe from the evidence he has lost on account of such injury; and you may consider what, if any, effect, such injuries may have upon him in the future in respect to pain and suffering, or in respect to his power to earn money by his labor; and you should allow him as damages such sum as, in the exercise of sound discretion, you may believe from all the facts and circumstances in evidence, will be a fair and just compensation to him for the injury, but not exceeding in the whole the sum of \$50,000. [160]

“In this case the plaintiff asks both actual and exemplary damages, aggregating the sum of \$50,000. There are two classes of damages which are awarded by juries in particular cases; there are actual damages, which are supposed to be exactly the equivalent

of the injury suffered; and there are exemplary damages and punitive damages, which are sometimes denominated smart-money. These are inflicted as punishment, and they are only proper where the injury or the negligence has been wanton or wilful, or has been inflicted under such conditions as to indicate a wicked spirit, or reckless disregard of the rights and of the safety of others. You can only award in this case actual damages. There is no evidence, to my mind, sufficient to warrant me in submitting to you the question of punitive damages, and therefore you are instructed that you cannot award such damages.

“If you find that the plaintiff is entitled to a verdict, you are not permitted to fix the amount by lot, by chance, or by averages. It is improper for one or more members of the jury to separately fix the damages, add these together, and divide by any number, agreeing beforehand that the result so obtained shall be the verdict; or for each member of the jury to set down a figure he thinks fair, and add these separate amounts, and divide the aggregate by twelve, agreeing beforehand that such a result shall be the verdict.

“I further instruct that the employer is required to furnish his employees a reasonable safe place to work, yet this duty of the employer is limited and confined to the premises where the employee is required to be in the line of his duty and in the course of his employment; this duty on the part of the employer does not extend to the protection of the employee outside of those places where he works, or

where he is directed and required to be in the line of his duty and in the course of his employment; and if plaintiff was not at the time of the accident at the place where he was directed and required to be, and where he should have been in the discharge of his duty, but of his own volition was at some other place in the mine to suit his own convenience, or for his own purpose, then I instruct you that the plaintiff himself would be guilty of negligence.

“You are the exclusive judges of the facts, of the credibility of the witnesses, and of the weight which is to be given to each statement made by [161] each witness. Counsel may declare what is proven, and the Court may express his views as to the facts; you, however, are to listen to such utterances, and give them such consideration, and such consideration only, as in your judgment you deem proper and reasonable as intelligent, honest men.

“As to the law, the rule is different. You are to follow the instructions of the Court. If the Court errs in its statement of legal principles, it is the error of the Court, for which the Court alone is responsible, and not the jury.

“It is hardly necessary for me to remind you that you are to consider only those facts which are disclosed by the testimony here admitted. You cannot go outside of or beyond the testimony. You are not to consider any testimony which has been stricken from the record.

“The plaintiff is not entitled to a verdict on any ground of negligence not set up in his complaint, neither is he entitled to recover in this action unless

you believe from a preponderance of the evidence that the injury was the natural and proximate result of some wrongful act, neglect or default of the defendant.

“By a preponderance of evidence is meant that evidence which after a consideration of all the evidence is entitled to the greater weight; it is such evidence as when compared with that opposed to it, has the more convincing force. The burden of proving his case by a preponderance of the evidence rests on the plaintiff. As I have already intimated, the defendant cannot be charged with a responsibility for the injury to the plaintiff, unless the injury was the direct and proximate consequence and result of the negligence and default of the defendant. A proximate cause of an event is defined as that which in the natural and continuous sequence, unbroken by any new independent cause, produced that event, and without which the event could not have occurred.

“A witness is entitled to the greatest weight, everything else being considered, who has the best opportunity to know and the highest degree of intelligence in seeing, understanding and weighing whatever appears before him in relation to the subject on which he is being examined. A witness is presumed to speak the truth; this presumption, however, may be repelled by [162] the manner in which he testifies, by his demeanor on the witness-stand, by the character of his testimony, by his motives, or by contradictory evidence or by his interest in the outcome of the case.

“In judging the credibility of the respective wit-

nesses in this case, if there is any conflict, you may believe the whole or any part of the evidence of any witness, and if you believe that a witness has testified falsely, and has done so knowingly and willingly, as to any material matter, you may disregard the whole or any part of his testimony as may be dictated by your best judgment, save where it is corroborated by other credible testimony.

“In this connection you must remember that your power and duty to judge of the effect of the evidence is not an arbitrary one, it must always be exercised with legal discretion, and in subordination to the rules of evidence.

“It takes twelve of your number to find a verdict. The clerk has prepared two forms of verdict, and when you have retired to your jury-room, you will elect a foreman; when you have agreed upon your verdict, you will notify the marshal, and you will be brought into Court.

“I will now leave the case with you, gentlemen, and I wish to say that I do it with the utmost confidence. You have listened to this evidence very patiently and very carefully. The hearing of the case has taken considerable time. You are to remember that you are here simply to find the truth, and to do that which is just and right between these two parties. You are not to be swayed by sympathy; you are not to decide against one party because it is a corporation, or in favor of the other party because he is a laboring man. You are not to be influenced by the condition, the wealth or poverty of either party; you are simply to give a verdict, just and fair, which your own con-

science will approve, and to do that which is right and just between man and man. Are there any suggestions that you wish to make, gentlemen?

“Mr. MILLER.—In that respect, if your Honor please, I have one suggestion, not as a criticism of the Court’s language, but in the instruction concerning the measure of damages.”

“The COURT.—I will instruct the jury further on that matter, although [163] I am satisfied that the jury understood. (Addressing jury.) The purpose of the Court was to confine you in finding your verdict to actual damages; that is, such damages as would fully compensate the plaintiff for his injury, and that is the limit to which you are permitted to go. You can go no further. The moment you attempt to give anything by way of punishment or smart-money, you are going further than the evidence justifies. If there were evidence here showing that the injury was wanton, or that there was a reckless disregard of the plaintiff’s rights, and of the safety of the miners in the mine, then it would be the duty of the Court to advise you of that fact, and instruct you further as to the matter; but I simply take the question of exemplary or punitive damages away from you, and tell you that you are to award such damages as fully compensate the plaintiff for his injury, provided, however, you find by a preponderance of the evidence, that the defendant was guilty of negligence, and that the negligence was the proximate cause, and direct cause, of the plaintiff’s injury, and that the plaintiff himself was not guilty of contributory negligence; that is, of negligence that was anything more

than slight negligence. If the plaintiff was guilty of slight negligence, which ministered and contributed to this injury, and the defendant was guilty of gross negligence in comparison with the plaintiff's negligence, then you will give a verdict for the plaintiff, but you should offset from it a reasonable amount which would be commensurate with his contributory negligence. If he is guilty of something more than slight negligence, he cannot recover. I think that is just what I intended to give before. You may take your exceptions now.

“Mr. MOREHOUSE.—I desire to except to that specific instruction of your Honor relating to the law of California, wherein your Honor has stated to the jury that the law of California was changed by statute in that State. The point which I desire to urge is that the law of California, as alleged in the complaint in this case, is insufficient to sustain or permit the prosecution of this action under that law, and if any law shall prevail, it has got to be the law of the forum, to wit; the law of the State of Nevada, as distinguished from the law of the *lex loci*, or place where the accident occurred.

“The COURT.—That is simply in line with the argument of the motion that was made? [164]

“Mr. MOREHOUSE.—Yes, that is in line with the argument on the motion.

“The COURT.—I am satisfied with that instruction. I think it is in line with the order I made overruling the motion.

“The COURT.—I will give this instruction as defendant has asked it. (Addressing the jury.) I

further instruct you that an employer is required to furnish his employee a reasonable safe place in which to work, yet this duty of the employer is limited and confined to the premises where the employee is required to be in the line of his duty and in the course of his employment; this duty on the part of the employer does not extend to the protection of the employee outside of those places where he is directed and required to be in the line of his duty and in the course of his employment. If plaintiff was not at the time of the accident at the place where he was directed and required to be, and where he should have been at work, but of his own volition was at some other place in the mine to suit his own convenience, and for his own purpose, and not for any purpose in line with his duty, then I instruct you that the defendant is not liable for the plaintiff's injuries."

"Mr. MOREHOUSE.—That will be satisfactory to us, if your Honor please."

"Mr. MILLER.—To which, if the Court please, the plaintiff desires to except on the grounds it is not a full and complete statement of the law; that it does not take into consideration the full and primary duty of the master to furnish a reasonably safe place to work; on the further ground that the instruction assumes some things not in evidence, as to the matter of suiting his own convenience, and matter of that kind."

"The COURT.—No, they must find that. If the jury finds that the plaintiff was not at the time of the accident at the place where he was directed and required to be, and where he should have been at work,

but if it finds that of his own volition he was at some other place in the mine, and he was there to suit his own convenience, or to suit his own purposes, then I instruct you that the defendant is not liable. The jury must find that before they can find the defendant not liable."

"Mr. MOREHOUSE.—Since the modification of this instruction to suit our contention, the only exception we have is to the instruction relating to [165] the law of California."

Thereupon the jury retired to consider of their verdict, and returned into Court with the following verdict, to wit:

"We, the jury in the above-entitled cause, find for the plaintiff, and assess the damages at \$12,500.00.

Dated November 26, 1913.

BURT DAKE,
Foreman."

That thereafter, within the time required by law, and, to wit, upon the 18th day of December, 1913, defendant Keane Wonder Mining Company duly served upon the plaintiff's attorneys, and filed in the above-entitled court, in the above-entitled matter, its petition for a new trial; that, at all times from and after said 18th day of December, 1913, up to and including the date of the filing of this Bill of Exceptions, to wit, March 14th, 1914, said last-mentioned petition for a new trial was and is now pending before said District Court.

That since the said verdict in favor of plaintiff as aforesaid said District Court, from time to time, by order duly made, has granted to said defendant ex-

tensions of time, to and including March 14th, 1914, in which to prepare, serve and file its Bill of Exceptions to be used upon motion for a new trial and upon any Writ of Error hereafter to be allowed, the said order being signed by said court and filed herein in the office of the clerk of said court.

The foregoing constitutes all of the proceedings had and all of the testimony offered and received on the trial of said cause.

And now, within the time required by law, and the rules of this court, said defendant Keane Wonder Mining Company proposes the foregoing as and for the Engrossed Bill of Exceptions as aforesaid and prays that the same may be settled and allowed as correct.

SWEENEY & MOREHOUSE,
B. M. AIKINS,
A. H. JARMAN,

Attorneys for said Defendant, Keane Wonder Mining Company, a Corporation.

GAVIN McNAB,
of Counsel. [166]

[Order Settling and Allowing Bill of Exceptions.]

The foregoing Engrossed Bill of Exceptions being now presented in due time and found to be correct, I do hereby certify that the said bill is a true Engrossed Bill of Exceptions, and that it contains all of the testimony offered and received, and a correct reference to all the Exhibits introduced, and true and correct photographic copies of same, and all of the proceedings had on the trial of said cause.

Dated, March 14, 1914.

E. S. FARRINGTON,
United States District Judge for the District of
Nevada.

[Indorsed]: No. 1576. United States District Court, District of Nevada. James Cunningham, Plaintiff, vs. Keane Wonder Mining Company, a Corporation, Defendant. Engrossed Bill of Exceptions to be Used by Defendant on Motion for New Trial, etc. Filed August 10, 1914. T. J. Edwards, Clerk. Gavin McNab, A. H. Jarman, Sweeney & Morehouse, Attorneys for Defendant.

[Order Granting Defendant Ten Days' Additional Time to File Record in Appellate Court.]

U. S. District Court, District of Nevada.

No. 1576.

JAMES CUNNINGHAM,

vs.

KEANE WONDER MINING CO.

Good cause appearing therefor, it is ordered that the defendant have ten days' additional time within which to file in Appellate Court, the record on writ of error in this cause.

Sept. 19th, 1914.

E. S. FARRINGTON,
U. S. District Judge.

[Indorsed]: No. 1576. U. S. Dist. Court, Dist. Nevada. Jas. Cunningham v. Keane Wonder M. Co. Order Enlarging Time to File Record on Writ of

Error. Filed Septr. 19th, 1914. T. J. Edwards,
Clerk. [167]

**[Order Granting Defendant Thirty Days' Additional
Time to File Record in Appellate Court.]**

*In the District Court of the United States for the
District of Nevada.*

No. 1576.

JAMES CUNNINGHAM

vs.

KEANE WONDER MINING CO.

Good cause appearing therefor, it is ordered that
the defendant have thirty days' additional time with-
in which to file the record on writ of error in the
United States Circuit Court of Appeals.

August 21st, 1914.

E. S. FARRINGTON,
Judge.

[Indorsed]: No. 1576. U. S. Dist. Court, Dist.
Nevada. Jas. Cunningham, v. Keane Wonder M.
Co. Order Extending Time to File Record on Writ
of Error. Filed August 21st, 1914. T. J. Edwards,
Clerk.

**[Order Granting Defendant Ten Days' Additional
Time to File Record in Appellate Court.]**

*In the District Court of the United States, in and for
the District of Nevada.*

JAMES CUNNINGHAM,

Plaintiff,

vs.

KEANE WONDER MINING COMPANY,

Defendant.

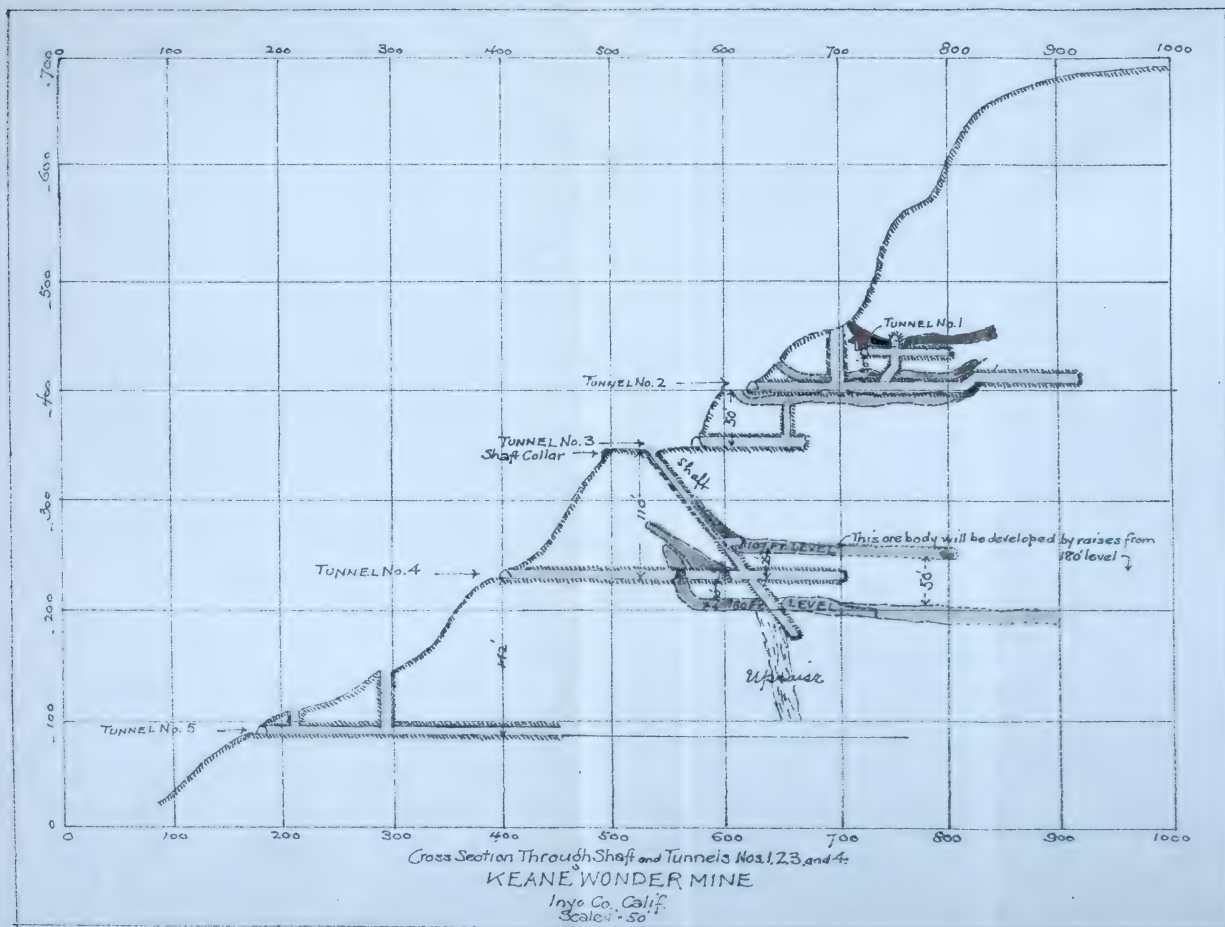
Good cause appearing, on motion of Sweeney & Morehouse, attorneys for the defendant in the above-entitled cause, the time within which to prepare and file its transcript on appeal on Writ of Error is hereby extended for a period of ten days.

Dated this 1st day of October, 1914.

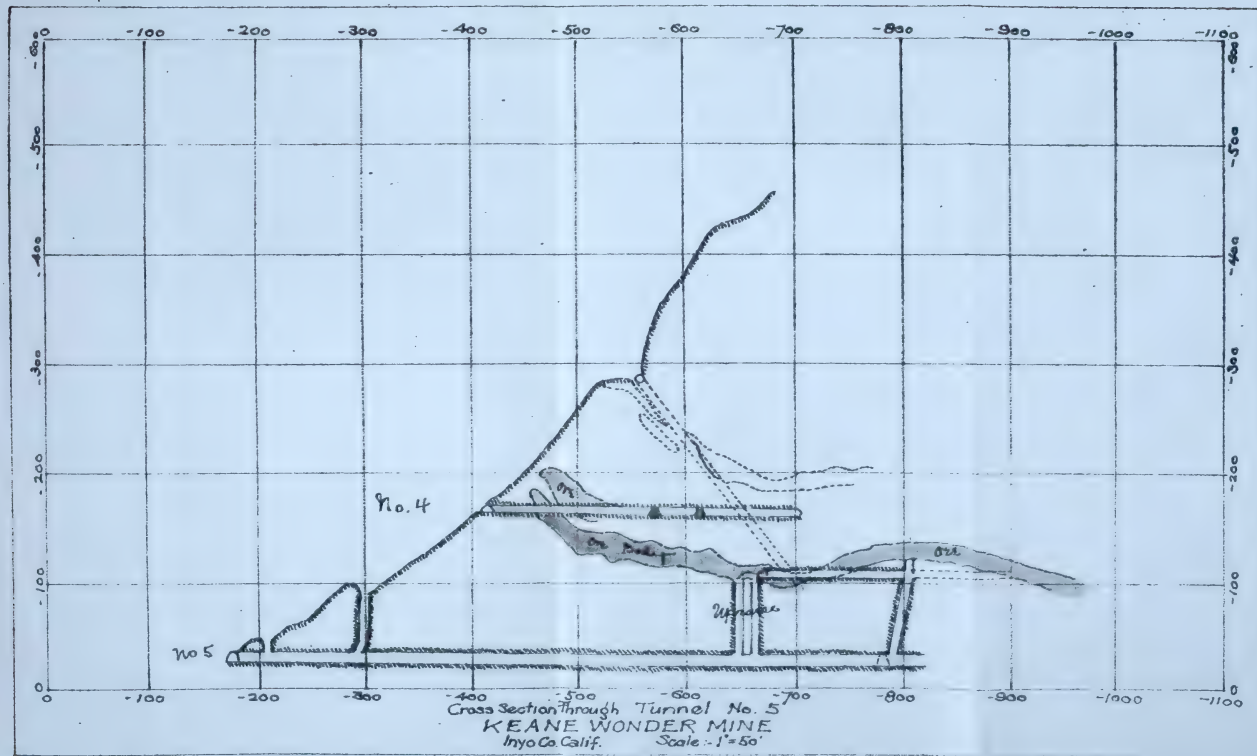
E. S. FARRINGTON,
United States District Judge.

[Indorsed]: No. 1576. In the District Court of the United States in and for the District of Nevada. James Cunningham, Plaintiff, vs. Keane Wonder Mining Company, Defendant. Order. Filed this 1st day of October, 1914. T. J. Edwards, Clerk. By H. D. Edwards, Deputy. Sweeney & Morehouse, Attorneys for Plaintiff. [168]

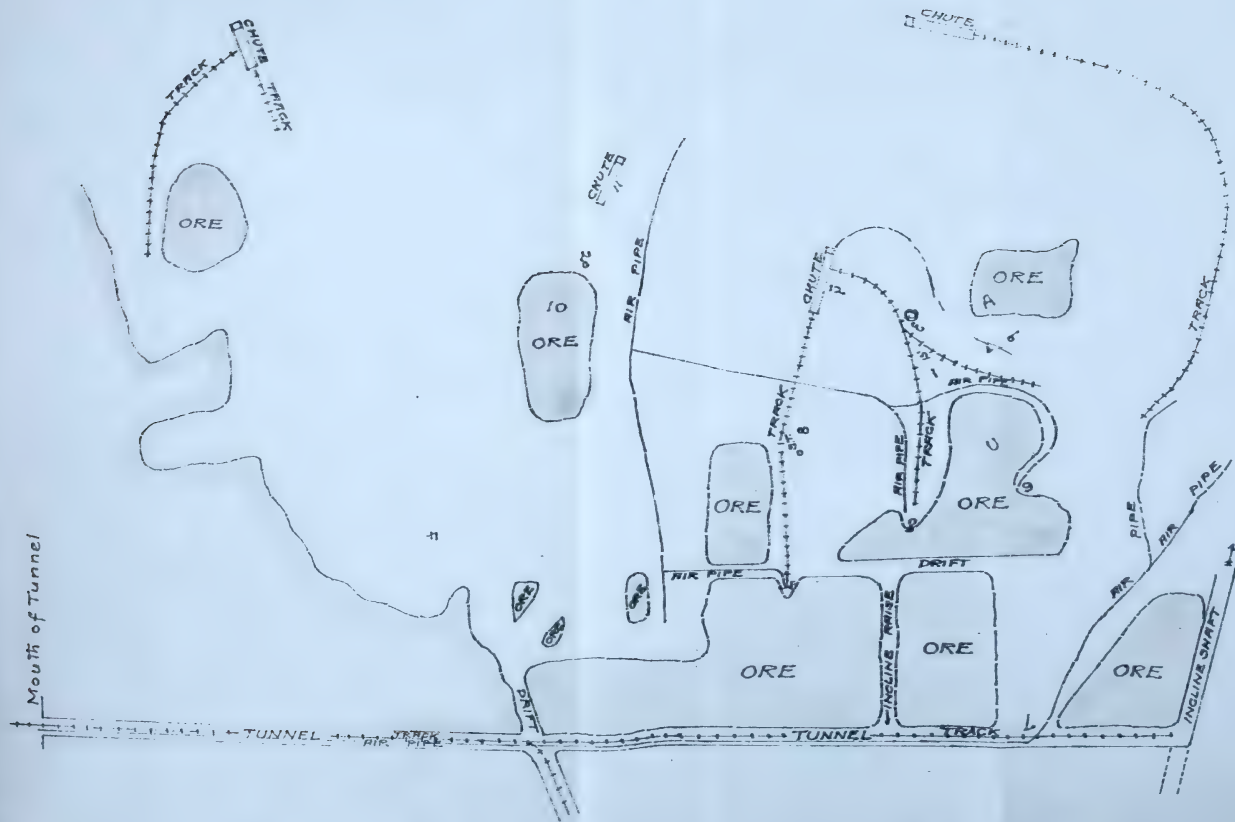
[Indorsed]: No. 1576, U.S. Dist. Court, Dist. Nevada.
 Cunningham v. Keane Wonder Mfg. Co. Defts. Exhibit C.
 Filed Novr. 24, 1913, T.J. Edwards, Clerk.



[Indorsed]: No. 1576. U.S. Dist. Court, Dist. Nevada.
Cunningham v. Keane Wonder M^g. Co. Defts. Exhibit B.
Filed Novr. 24, 1913, T. J. Edwards, Clerk.



[Indorsed]: No. 1576. U.S. Dist. Court, Dist. Nevada.
 Jas. Cunningham v. Keane Wonder M^y Co. Plffs Ex. No. 1.
 Filed Novr. 20. 1913, T. J. Edwards, Clerk.



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No. 1576
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*In the District Court of the United States, in and for
the District of Nevada.*

No. 1576.

JAMES CUNNINGHAM,

Plaintiff,

vs.

KEANE WONDER MINING COMPANY (a Cor-
poration),

Defendant.

Citation on Writ of Error [Original].

The President of the United States of America, to
James Cunningham, and to Dixon & Miller, His
Attorneys, Greeting:

YOU AND EACH OF YOU ARE HEREBY
cited and admonished to be, and appear, in the Cir-
cuit Court of Appeals for the Ninth Circuit, at the
City and County of San Francisco, State of Cali-
fornia, within thirty (30) days from and after the
date this citation bears, pursuant to a writ of error
filed in the office of the Clerk of the United States
District Court in and for the District of Nevada, in
the above-entitled cause, wherein James Cunning-
ham is plaintiff, and Keane Wonder Mining Com-
pany, a corporation, is defendant, to show cause, if
any there be, why the judgment made and rendered
in the above-entitled cause on the 14th day of March,
1914, against the said Keane Wonder Mining Com-
pany, a corporation, as defendant in said writ of
error mentioned, should not be corrected and re-

versed, and why [169] said justice should not be done to the parties in that behalf.

WITNESS, the Honorable E. S. FARRINGTON, United States District Judge in and for the District of Nevada, this 22 day of July, 1914.

E. S. FARRINGTON,
United States District Judge for the District of Nevada. [170]

[Endorsed]: Original. No. 1576. United States District Court, District of Nevada. James Cunningham, Plaintiff, vs. Keane Wonder Mining Company, Defendant. Citation on Writ of Error. Filed July 24th, 1914. T. J. Edwards, Clerk. [171]

[Certificate of Clerk U. S. District Court to Transcript of Record.]

In the District Court of the United States for the District of Nevada.

No. 1576.

JAMES CUNNINGHAM,

Plaintiff,

vs.

KEANE WONDER MINING COMPANY, (a Corporation),

Defendant.

I, T. J. Edwards, Clerk of the District Court of the United States for the District of Nevada, do hereby certify that the foregoing type-written pages, numbered from 1 to 171, both inclusive, are a true copy of the record, and of all the proceedings in the

cause therein entitled, and that the same together constitute the return to the annexed Writ of Error.

I further certify that the cost of this record is \$206.50, and that the same has been paid by the solicitors for defendant; and that copies of Exhibits No. 1, and of "A," "B" and "C" are attached hereto and made a part hereof.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said court, at Carson City, Nevada, this 6th day of October, 1914.

[Seal]

T. J. EDWARDS,
Clerk. [172]

[Endorsed]: No. 2495. United States Circuit Court of Appeals for the Ninth Circuit. Keane Wonder Mining Company, a Corporation, Plaintiff in Error, vs. James Cunningham, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court for the District of Nevada.

Filed October 10, 1914.

FRANK D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

*In the United States Circuit Court of Appeals for the
Ninth Circuit.*

JAMES CUNNINGHAM,

Plaintiff and Appellee,

vs.

KEANE WONDER MINING COMPANY, a Cor-
poration,

Defendant and Appellant.

**Order Enlarging Time to November 7th, 1914, to File
Record on Appeal.**

Good cause appearing, IT IS HEREBY ORDERED that the appellant have until the 7th day of November, 1914, within which to file the record on its appeal, and docket the case, and the appellant's time is hereby enlarged to that extent.

Dated October 21st, 1914.

WM. M. MORROW,

M. T. DOOLING,

Judges.

[Endorsed]: No. 2495. In the United States Circuit Court of Appeals for the Ninth Circuit. James Cunningham, Plaintiff and Appellee, vs. Keane Wonder Mining Company, a Corporation, Defendant and Appellant. Order Enlarging Time to November 7th, 1914, to File Record on Appeal. Filed Oct. 22, 1914. F. D. Monckton, Clerk.

2495
No. ~~2425~~

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

KEANE WONDER MINING COMPANY
(a corporation),

Plaintiff in Error,

VS.

JAMES CUNNINGHAM,

Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

GAVIN McNAB,
SWEENEY & MOREHOUSE,
B. M. AIKINS,
A. H. JARMAN,
Attorneys for Plaintiff in Error.

Filed this.....day of January, 1915.

Filed

FRANK D. MONCKTON, Clerk.

JAN 28 1915

By.....Deputy Clerk.

F. D. Monckton,

Clerk.

No. 2425

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

KEANE WONDER MINING COMPANY
(a corporation),

Plaintiff in Error,

vs.

JAMES CUNNINGHAM,

Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

I.

General Statement of the Case.

This writ of error is prosecuted from a judgment of the United States District Court of the District of Nevada.

It is sought to review the judgment of that Court entered pursuant to the verdict of a jury, awarding defendant in error, James Cunningham, the sum of twelve thousand five hundred dollars as damages for injuries sustained by him on December 9, 1911, at Keane Wonder, Inyo County, California, while in the employ of Keane Wonder Mining Company,

the plaintiff in error, hereinafter referred to as "Mining Company". Judgment was entered and sustained in the Court below upon the theory that the injuries to Cunningham were the result of the want of ordinary and reasonable care of the Mining Company in the operation of its mine at Keane Wonder, where Cunningham was employed,—the contention being, in substance, that the Mining Company caused and permitted Cunningham to work in a certain stope in said mine, while said stope was in a dangerous condition due to the negligence of the Mining Company in not properly timbering same; in not properly examining and inspecting same, and in not properly picking or barring down loose rock or ore at the roof or top of said stope.

After the entry of judgment, the Mining Company moved for a new trial, which motion was heard in the Court below on March 14, 1914, and denied. Said motion for new trial was made upon three grounds, to wit:

1. That the evidence in the case is wholly insufficient to justify the verdict of the jury or to sustain a judgment entered thereon.

2. That said verdict and said judgment were and are against law.

3. That the verdict of said jury in favor of plaintiff in the sum of twelve thousand five hundred dollars was and is excessive damages appearing to, and which were given by, the jury under the influence of passion or prejudice.

Plaintiff in error presents the question and challenges the sufficiency of the evidence to sustain the judgment. At the outset, it wishes the Court to understand that it is fully advised that the granting or denying of a motion for a new trial is, in general, a discretionary matter with the Court below, and that ordinarily, this Court will not review such an order *unless it be manifest* that the order made in relation thereto, was and is an abuse of discretion. The denial of the Mining Company's motion for new trial was and is an abuse of discretion, for the reason *that there is no evidence of any negligence* on the part of the Mining Company which resulted in or contributed to the injuries sustained by Cunningham, for which the jury awarded him twelve thousand five hundred dollars. The judgment of any Court can only be upheld when there is legal and sufficient evidence to sustain it.

The questions of law to be reviewed on this appeal are comparatively few, and can best be understood by a statement of the facts in chronological order.

THE PLEADINGS.

Admitted Facts.

It is admitted by the pleadings that plaintiff in error was and is a mining corporation organized and existing under and by virtue of the laws of the State of Arizona, and at all the times mentioned in the amended complaint, owned and operated a cer-

tain mine in Inyo County, State of California, commonly known as the "Keane Wonder Mine". That Cunningham was engaged and employed by said Mining Company as a miner and mucker in said mine, and on the 9th day of December, 1911, while in said mine, a body of ore and rock fell upon him and broke his left leg, and otherwise bruised and scratched him.

It is admitted that it was and is the duty of the Mining Company to furnish Cunningham, and all other employees, a safe place to work, and safe ways, works, machinery and appliances therefor, and that it was and is the duty of said Mining Company to use ordinary and reasonable care in its methods of operating said mine and in extracting the ore and rock therefrom.

Amended Complaint.

The amended complaint alleges that while Cunningham was in the employ of said Mining Company, as aforesaid, and while at work in said mine, in the line of his duty and in the course of his employment, that a mass of ore and rock fell from the top or roof of a stope, upon him, by reason of which he was scratched, bruised and wounded, and his left leg broken and splintered.

The negligence attributed to the Mining Company is alleged as follows:

"But defendant, by and through its own negligence and the negligence and carelessness of its officers, agents and other servants, failed and neglected to furnish plaintiff with a safe

place to work, and safe ways, works, machinery and appliances therefor, and failed and neglected to exercise ordinary or reasonable care in its methods of operating said mine, and extracting the ore, rock and other materials therefrom; but on the contrary, the defendant, its officers, agents and other servants, negligently and carelessly drove a certain stope upward from a tunnel situated in said mine, and failed and neglected to use ordinary or reasonable care in the examination and inspection of the roof or top of said stope, and failed and neglected to pick or bar down from said roof or top of said stope, loose rock and ore therein or thereat, and caused and permitted the said plaintiff to work, in the course of his employment, in said tunnel at the bottom of said stope *while said stope was in a dangerous condition owing to the negligence of the defendant, its officers, agents and servants, in not properly timbering the same, and in not properly examining and inspecting the same, and in not properly picking or barring down the loose rock at the roof or top of said stope*, by reason whereof a mass of ore and rock fell from the top or roof of said stope on and upon plaintiff, etc.”

(Tr. p. 10.)

The sum and substance of the allegations of alleged negligence being in three assignments, to wit:

1. *In not properly timbering said stope.*
2. *In not properly examining and inspecting same.*
3. *In not properly picking or barring down the loose rock at the roof or top of said stope.*

It is conceded that the injuries of which Cunningham complains, and for which he recovered

judgment, were sustained by him in the State of California, and accordingly, it is alleged that at the time of the injuries, there was in effect in said state a certain statute applicable thereto, making contributory negligence a defense by comparison only, and abrogating assumption of risk and the fellow-servant rule as defenses in actions of this character (Tr. p. 12). The act referred to is generally known as "Roseberry Liability and Compensation Law of California" (Stats. 1911, p. 796), and that part thereof applicable to this case is as follows:

"Sec. 1. In any action to recover damages for personal injury sustained within this state by an employee while engaged in the line of his duty or the course of his employment as such,
 * * * in which recovery is sought upon the ground of want of ordinary or reasonable care of the employer, or of any officer, agent or servant of the employer, the fact that such employee may have been guilty of contributory negligence shall not bar a recovery therein where his contributory negligence was slight and that of the employer was gross in comparison, but the damages may be diminished by the jury in proportion to the amount of negligence attributable to such employee * * *; and it shall not be a defense:

1. That the employee either expressly or impliedly assumed the risk of the hazard complained of.

2. That the injury or death was caused in whole or in part by the want of ordinary or reasonable care of a fellow servant."

Answer.

The answer admitted that it was the duty of the Mining Company to furnish its employees safe places to work and safe ways, works, machinery and appliances therefor, and that it was its duty to use ordinary and reasonable care in its methods of operating said mine and in extracting the ore and rock therefrom, and it averred that said company did use ordinary and reasonable care in operating its said mine.

All the allegations of the amended complaint charging negligence are denied.

Separate defenses are pleaded, the third setting up that the injury to Cunningham was without fault or negligence on the part of said Mining Company, and was the *result of the risk or danger assumed* by him in his said employment, and that he knew, or ought to have known, all the risks and dangers incident thereto, and particularly the risks and dangers necessarily resulting from the falling of loosened rock at the roof or top of any stope in the mine (Tr. p. 21).

The fifth defense alleges that the injury to Cunningham was occasioned by causes purely accidental, and by no reason of negligence or want of ordinary or reasonable care on the part of said Mining Company (Tr. p. 23).

The sixth and last defense avers that the injuries to Cunningham occurred in the State

of California, and that at the time, said Mining Company was not and is not now engaged in business in the State of Nevada, and did not, and does not now, maintain an office therein, and that its principal office and place of business was and is in the State of California. That said Cunningham, by his said action, seeks to enforce a right given him under and by virtue of a law of the State of California (above referred to), which said law is materially and fundamentally different from the law of the State of Nevada in relation to the same subject, and that he should not be allowed to assert and enforce in the United States District Court for the District of Nevada, a right given him under the law of the State of California, which is materially and fundamentally different from the law of the State of Nevada in relation to the same subject (Tr. p. 23).

At this point we particularly direct the Court's attention to the fact that the law of the State of Nevada, in effect December 9, 1911, *allowed and permitted* in that state, in actions of this character, *the defense generally known as assumption of risk*, though in this action the Court below struck out such pleaded defense and instructed the jury that assumption of risk was not a defense that could be considered by them. The Nevada law will be hereafter quoted, in extenso, in our argument covering this point (Tr. pp. 250-1).

Proceedings:

With the issues thus framed, the case was brought on for trial before a jury on the 19th day of November, 1913, whereupon, upon motion of counsel for defendant in error, the third defense above referred to (assumption of risk) was stricken from the answer (Tr. p. 54), to which ruling an exception was duly taken and allowed (Tr. p. 55).

At the conclusion of the evidence for defendant in error (hereinafter set out), plaintiff in error moved for a directed verdict or a nonsuit upon various grounds (Tr. p. 135), which motion was by the Court denied, and to which ruling an exception was duly taken and allowed (Tr. pp. 134-140).

At the conclusion of all the evidence, plaintiff in error renewed its motion for a directed verdict, but same was denied and an exception allowed (Tr. p. 244).

Thereupon the Court instructed the jury, among other things, as follows:

“The injury complained of occurred in the State of California, consequently we are governed by the law of that commonwealth in the particulars which I shall indicate. Formerly in California it was the law that the employee assumes the ordinary risks of his employment, and that he could not recover if he were himself guilty of contributory negligence, which negligence directly caused or contributed to cause the injury, or if the injury was the result of the negligence of a fellow servant. This has

been changed by the statute of that state. Now in any action to recover damages for personal injury sustained in California by an employee while engaged in the line of his duty or in the course of his employment, on the ground of the want of ordinary or reasonable care of the employer, or of any officer, agent, or servant of the employer, it shall not be a defense that the employee, either expressly or impliedly, assumed the risk or the hazard complained of, or that the injury was caused in whole or in part by the want of ordinary or reasonable care of a fellow servant.

Furthermore, the fact that such employee himself may have been guilty of contributory negligence, shall not bar a recovery therein, where his contributory negligence was slight and that of the employer was gross in comparison, but the damages may be diminished by the jury in proportion to the amount of negligence attributable to such employee.

If you find from the evidence that said injury to plaintiff resulted from contributory negligence on the part of the plaintiff, and that no negligence is proven or established on the part of the defendant, or that the negligence on the part of the defendant, if any, is not gross in comparison with the negligence established on the part of the plaintiff, then I instruct you that if the plaintiff is guilty of contributory negligence which is more than slight negligence, he cannot recover."

(Tr. pp. 250-1.)

To the giving of which instruction plaintiff in error then and there entered its objection, but same was overruled and exception allowed (Tr. p. 258).

EVIDENCE PRESENTED BY DEFENDANT IN ERROR.

James Cunningham, defendant in error, testified, in substance, as follows:

“I was born in 1881. I first started to work in the mines in the latter part of 1906. I have worked in different mines, including Tonopah Extension, Mohawk, Johnnie Mine, and Mizpah Mine. I went to work for Keane Wonder Mining Company about October 9, 1911. On December 9, 1911, I went on shift at half past seven in the morning. The work which I began to do on that day was mucking. After working some time, Mr. Roper, the foreman, put me to work at the place where I was hurt, and I put in a switch there. *We finished putting in the switch near noon, when Mr. Roper, the foreman, said he was going to the Whipsaw and left me working there,* with instructions to put in a set of rails when there was room. I worked shoveling into a car until about ten minutes to four, and I was just throwing a shovelful into a car, and I was caught and knocked over a little bit, and was just caught in that position, just tipped over, and to the left of me, the rock kept falling down, and it raised up six or seven feet, then it rolled down on my left side, so from this side I was covered up from about here; I heard Mr. Porter hollering over on the other side; there was three or four muckers there who came and took me out, and when they rolled the rocks off of me, they found this leg broken. It was a slab of ore, a slab of rock which struck me which came from the roof. The roof was about sixteen to twenty feet above my head; approximately seventy ton of rock fell. The only place that I ever worked in that mine was in that stope. The ore which I was shoveling at the time I was injured was broken down by machine, a shift or two before that; some of

it maybe there a week. The vein or ore body varies from twenty to sixty feet. It is a flat or blanket vein. The thickness of the ore at the place where I was injured, from the foot-wall to the hanging-wall, was close to twenty-five feet. The ore or rock that fell on me fell from the top over my head. *The roof of that stope was not supported by anything.* At the place where I was injured there was no timbering, and there was no means whatever in use at that time to keep the rock from falling. Roper was the foreman and he directed me to work at the particular point where I was injured. *Mr. Roper was working with me that morning for two or three hours at the place I was injured.*

I did not make any examination of the roof of that stope or the place where I was injured. The roof at this place was about sixteen feet above my head, and there was no means there by which I could have reached the roof to examine it. Mr. Roper did not make any examination of that roof that morning.

Mr. Keith was the superintendent at that time. He was in the mine on the morning of December 9, 1911. My partner, Mr. Perez, was working ten or twelve feet from me at the time I was injured. There was also three or four Mexicans close by.

Cross-Examination.

Q. Were there any pillars in there?

A. Yes.

Q. Was there any timbering in there?

A. Yes, there was a few stulls in the stope. It was a pretty large stope.

Q. Was the roof of the stope protected by pillars or by timbers?

A. No, sir.

Q. It wasn't protected at all?

A. Not where I was working.

Q. How large was the stope where you went to work that was not protected, either by pillars or timbers?

A. Well, there is a few pillars in the stope, and a few stulls.

Q. *Then there were some pillars in the stope?*

A. Yes.

Q. What are the pillars?

A. Part of the ore left.

Q. And what is it left for?

A. It is left to protect the mine.

Q. To protect the mine. It stands there then a solid body of ore or earth, to hold up the roof of the stope, doesn't it?

A. That is what it is left for.

Q. *And where there is one left there is no use for any timbers, is there?*

A. Oh, yes, you have got to timber it.

Q. *Always—do you always have to timber it?*

A. *It all depends on how wide them pillars is.*

Q. *Precisely; and the width of the stope?*

A. *And the width of the stope."*

(Tr. p. 70.)

"Q. Do you remember, Mr. Cunningham, how many pillars there were at the point where you were hurt on December 9th, 1911?

A. Well, there was some pillars there quite a distance away from one side, and I was close to a pillar on another side.

Q. At the time you were hurt, the work was on the face of the ore body?

A. Yes. *We would leave several pillars all over the stope there.* The cave was here at this switch; it covered the switch. About seventy tons of rock fell. I don't remember just how many pounds there are in a ton. I don't know how many cubic feet there are in a ton of ore.

When I said seventy tons, it was a mere matter of guess.

Q. *You know there were pillars in that mine?*

A. *Yes.*

Q. *You know what they were left there for?*

A. *They were there to protect the mine.*

Q. *They were there to protect the mine and to protect the roof of the mine?*

A. *Yes.*

Q. *And to prevent the falling of the roof on to the floor of the stope?*

A. *Yes."*

(Tr. p. 75.)

"The height of the stope from the floor to the roof was from twenty to sixty feet, I believe. I am just guessing at that.

The mucker takes away the muck that has been thrown down by the explosions. After firing the shots which breaks down the ore, the miner goes in first and bars down the loose rock, and he tells the mucker when it is safe for him to come in.

Q. *Now then, when you went in there who was the miner where you went to work mucking?*

A. *That ground that fell down, I think it was hanging there for about four days.*

Q. *What do you mean by hanging four days?*

A. *It was hanging up to the hanging-wall there; it was four days from the last miner had worked there.*

Q. *And did you observe it when you went in?*

A. *No, I didn't pay no attention to it.*

Q. *You didn't look at it at all to see whether it was loose or not?*

A. *No, sir.*

Mr. Roper took me in there to work, and I thought it was all right; Mr. Roper said nothing to me at all. *Me and him put in the switch.*"

(Tr. p. 77.)

"Q. *You know nothing and heard nothing and saw nothing that would indicate that the roof of the stope there was loose at all?*

A. *No, sir.*"

(Tr. p. 78.)

"The morning shift of muckers would go down and remove the muck broken down by the night shift machine men, *and before sending the muckers to work, the foreman would send a miner there first to bar down the loose rock and inspect the roof.*"

(Tr. p. 80.)

"Q. Well, the night shift was cleaning away the muck that had been created by the machine men of the day shift?

A. Not always; when them four men would go on shift, *the foreman would go there with them; either that, or he would send a miner, and sometimes he would bar down that loose rock himself and see that the place was what he thought safe before we would go in there to work. That is what they were doing.* That is what they did in all other mines that I worked in. I had no conversation with anybody about whether it was safe or not to work there. When the foreman sent me in there I thought it was all right. *No one told me anything about it one way or another.* Mr. Roper worked with me in putting down this switch. The nearest machine was Old Mack,—*about fifteen feet from me.* At the time the top of the roof of the old stope fell down, I was just throwing a shovelful of dirt into the car. *I was caught so*

quick there was no chance to get away; it just fell like a flash of lightning.

Q. Did you have any warning, or hear any noise, or know anything about it, until it occurred?

A. No, sir.

Q. During the time that you were working there, did you ever make any request for any timbers, or anything to be done by your employers in the way of protecting the mine?

A. No, sir.

I didn't notice whether any injury was done to the car that I was throwing ore into. I was about three or four feet from the car. I don't know how many pillars were left to protect the roof."

(Tr. p. 82.)

"Q. Well now, I will ask you plainly, is it not a fact that there were three pillars, and that this caving took place so that it fell down between these three pillars, which were very close together?

A. Oh, it is quite a distance between them pillars. Where Mack was working it was a block of ground, constituting a pillar in itself. I was hurt pretty close to where Mack was. I was about fifteen feet from where he was. All of that unworked ground where Mack was working was a pillar. At the point where I was hurt, there was about five or six feet of ore sticking up on the hanging-wall. It was worked out where I was standing except for the ore sticking up to the hanging-wall.

Q. Now that was worked out at that point, and at that point were there not three pillars very near by?

A. No, not that I know of. There was a pillar close to where Porter was."

(Tr. p. 84.)

“Q. Now, from that point where Mack was working, how far was it to the first pillar nearest to you which had been left in the territory that had been worked out?

A. *It would be ten or twelve feet.*

Q. Now then, that pillar would be how far from where Mack was working?

A. *Oh, it would be over twenty feet I guess.*

Q. Weren't there three near by, not over fifteen or twenty feet apart, running in a sort of a triangle from one point to the other, in the three pillars?

A. Not the way it looks to me.

Q. I don't care how it looks to you; I want to know whether it is a fact or not.

A. Well, I am stating to you as clear as I can what I know.

Q. *Do you really know very much about this underground place where you were at work?*

A. *No, I don't.*”

(Tr. p. 85.)

At the point where I was hurt, I think the stope would be about twenty-five feet, from wall to wall. *I never measured it or saw it measured. You could see ore in the top of the stope. It was a kind of gray colored quartz. The schist hanging-wall was a dark color. You could easy see it was waste, though.*

Q. Mr. Cunningham, you have stated that the stope was a good deal larger than this room; will you state approximately how large that whole stope is, or was at that time?

A. Well, to walk right around it as it is there I think it would be about six hundred feet.”

(Tr. p. 88.)

“There were timbers at the chutes.

Q. That is, the chute timbers ran clean up to the hanging-wall?

A. Yes.

Q. How long were those chute timbers, do you know?

A. Well, where the chutes was they would be—oh, *I think about ten feet.*”

Dr. E. A. Wheeler, a practicing physician and surgeon, testified as follows:

“I attended Cunningham for the injury complained of, and operated on his leg, and attended him until he was discharged from the hospital. In my opinion he is able to do a fair amount of work, but he is not able to do the heavy work around a mine; however, he is not totally disabled. There will be some disability, and he will have to wear a thick shoe, because of the shortening of the leg. I and my assistants and the hospital bills were paid by the Keane Wonder Mining Company. The injury to Cunningham is not such that it will affect his general health in the future.”

(Tr. pp. 90-92.)

Mat Dropulich testified as follows:

“I have been a miner for about five years. I was working at the mine at the time of Cunningham’s injury, but I was not working on the day that he was hurt. I worked in the same stope afterwards. The space between the floor of the stope and the roof is from fifteen to twenty feet.

Q. *How was the roof of that stope supported?*

A. *Well, the roof, I want to tell you that place ain’t exactly—I can’t tell you whether the roof was solid or soft or loose, I can’t tell you that exactly.*

Q. Well, was there anything to support the roof to keep it from falling?

A. You mean timbers?

Q. Yes; or anything else?

A. What I can remember, I didn't see timbers in that stope; I cannot remember, I would not tell you exactly about that.

Q. *Was there anything else there to support the roof at that point?*

A. *There was some kind of pillars."*

(Tr. pp. 93-94.)

“Cross-Examination.

After shots have been fired breaking down the ore body, a miner goes to the place first. *Miner got to go to the place and see if there is any loose rock.* Mucker goes after; mucker have no right to pick it down; it is all the miner's business. Muckers have no business to take a pinch-bar and strike the surface, and find out whether the rock is loose.

Q. Now, you say the first workman that goes into the mine after the shots have been fired is a miner?

A. Miner—work all together; miners come first to the place.

Q. *What does the miner do then?*

A. *Oh, he take a pick or something, machine or something, just to rap the roof to see whether it is loose.*

Q. That is all a miner does in a mine?

A. When he go to the place, the other place, then, to see whether loose or not, and then drill them out."

(Tr. p. 95.)

“There were some pillars in the stope, but not very much pillars.

Q. Do you know anything about mining?

A. I know anything about work, but I don't know anything about mine.

Q. You wouldn't know a mine, I suppose, if you saw it, would you?

A. If I saw it?

Q. *Yes, if you saw a mine you wouldn't know it?*

A. *Well, nobody could know. You see that position is pretty hard to tell; if it is a lot loose you would know something, but if it is a little loose nobody would know."*

(Tr. pp. 99-100.)

"Redirect Examination.

Q. Mr. Dropulich, you stated in answer to Senator Morehouse that there were some pillars in the stope, pillars of ore supporting the roof.

A. He was some pillars, yes; pillars of ore, yes; I am sure that way, but I can't tell you how many pillars there was."

* * * * *

Louis Guerra testified:

"I have been working in mines for eleven years. I was working in the Keane Wonder Mine in the month of December, 1911, as a mucker. On the afternoon of the day that Cunningham was injured I was working about twenty or twenty-five feet from him, and the first thing that attracted my attention to Cunningham's injury was the cave.

Q. In what position or condition was Mr. Cunningham when you first saw him after the cave?

A. *He was covered in rock about up to his knees, lying on his side.*

Q. *Who helped dig Mr. Cunningham out of the rock, if you know?*

A. *I did and my partner."*

(Tr. p. 105.)

"The part that fell and caved on him was a mixture of waste and metal; as near as I can

tell or estimate it, about sixty cars fell. There were no stulls or timbers supporting the hanging-wall at or near where the rock caved.

Cross-Examination.

Q. *How many pillars were there where Mr. Cunningham was hurt?*

A. *Two pillars.*

Q. *Were they large or small?*

A. *Oh, regular size.*

Q. *Regular size. How far from the pillars was Mr. Cunningham hurt?*

A. *About twenty-five or thirty feet.*

Q. *Was there a car track near there?*

A. *A car track passed in the middle.*

Q. *That car track passed in the middle, that is, between the pillars?*

A. *Yes, sir.*

Q. *Where the waste rock with mineral fell down, was that roof of the stope or hanging-wall protected with pillars?*

A. *The pillars were there, but they did not stop the cave.*

Q. *How far from the pillars did the cave come down?*

A. *About twenty-five or thirty feet."*

(Tr. pp. 106-107.)

"About forty or fifty feet from where I was working there were other pillars besides these two. Immediately following the accident I saw a car standing on the track, about ten or twelve feet from the pillar."

(Tr. p. 108.)

A. Perez testified:

"I was employed in the Keane Wonder Mine in December, 1911, as a mucker. I have worked in mines since 1902. At the time of the cave and the injury to Cunningham I was working about the length of a rail from him.

Q. Length of a rail, and that is about how many feet, as near as you can tell?

A. Well, I think that rail was fourteen feet long."

(Tr. p. 108.)

"At the time of the accident I was shoveling rock into the car. Mr. Cunningham was between me and the chute. What first called my attention to Mr. Cunningham being injured, was a crash, which sounded to me like a blast. I heard Cunningham asking for mercy. *Then I went and found him with his legs wedged among rocks*, and we throw out the rocks, and then went to help Porter; he was held against the pillar. Cunningham's leg was broken. I didn't notice any other injuries upon his person other than some bruises and red spots around the arms or wrists.

Q. Were there any timbers or stulls supporting the hanging-wall at the place or near where Mr. Cunningham was injured?

A. Well, there were *two stulls* hanging the chute frame, *another stull*, I think, to the right hand of switch, a little ways, probably over ten feet, from ten to fifteen feet.

Q. Ten or fifteen feet from where?

A. From the switch.

Q. And the two stulls——

A. (Intg.) *And another one*, well, about the same distance, from ten to fifteen feet."

(Tr. p. 110.)

"There were no timbers or stulls supporting the hanging-wall right at the place where he was injured.

Cross-Examination.

I am familiar with the car track there and the little switch that ran off from the car track. *Mr. Roper and Mr. Cunningham built this little switch.*

Q. Right at this point or very near this point where Mr. Roper and Mr. Cunningham laid this little switch, were there any pillars?

A. Well, I suppose that track was shooting between a pillar and a body of ore, after while they cut a pillar there in the far corner.

Q. How far apart were these pillars near the place where the accident occurred?

A. Oh, well, the first pillar was close to the track, and the other pillars were too far away from there. The nearest pillar there was where Mr. Porter got caught. That was maybe fifteen feet, and maybe more, and maybe less, from where Cunningham was hurt. That was the first pillar nearest to Cunningham.

Q. You stated something about Mr. Porter being pinned up against a pillar?

A. *No, Mr. Porter was caught in the pillar closest to the switch where the hanging-wall fell.*

Q. How far was that pillar where Mr. Porter was caught from where Mr. Cunningham was hurt?

A. I could not tell exactly."

(Tr. p. 113.)

"That afternoon I had been working in the mine on or about the place where Mr. Cunningham was hurt. On that day they were working on the face of the ore body; three machines were working. All the balance of this stope, except the face of the ore body, had been worked out before, that is, to the left hand side of the stope. *There was no more hanging-wall working, except at the place where we were working that day.*

Q. There was some hanging ore then on the hanging-wall at the place where you were working that day?

A. *Well, there was hanging ore where I worked that afternoon.*

Q. *And that was how far from where Mr. Cunningham was at work?*

A. *In the same place.*

Q. Now what were you doing when the accident occurred?

A. Oh, I was shoveling in the car.

Q. And what was he doing?

A. Well, when I saw him, he was with his shovel in his hand. I guess he was shoveling back of me, *shoveling coarser stuff in the car*, and the finer stuff between the ties of the track we lay that afternoon."

(Tr. pp. 114-115.)

"It was the piston machine was breaking ore ahead, and this ore would be thrown back from the piston machine, and I was taking up this ore and throwing it into the car, to be rolled out to the chute. After a blast is fired off by the miner, or machine man, if he shoots between half past seven in the morning, and half past four in the afternoon, then a miner will go back.

Q. But if he shoots at any other hour, then what does he do?

A. If he shoots at a different time, the night shift will look after it."

(Tr. p. 115.)

"Q. If he shoots at quitting time, he goes off shift entirely?

A. Yes, sir.

Q. And that muck is left there?

A. Yes.

Q. And the next morning he goes in to remove it?

A. Probably the same man.

Q. Probably what man?

A. The same miner that shoot the day before.

Q. *A miner is a mucker, is he?*

A. *He have to go there to see the country.*

Q. What would be the use of the mucker if the miner goes back and mucks himself?

A. I never tell you that.

Q. I know you don't; I am asking you if that is so?

A. *The miner goes back to see the country, and if he says it is all right, the mucker go after and shovel in the car.*

Q. *The mucker don't go to work until the miner comes and tells him to go?*

A. *He go at the same time, probably he can do something around till the place is safe to work underneath."*

(Tr. p. 116.)

"Q. The foreman is not there all the time, is he?

A. Well, supposed to be.

Q. He is supposed to be in there all the time?

A. Supposed to make his rounds.

Q. I see. *This man Roper made his rounds regularly, did he?*

A. Yes.

Q. *And he was foreman?*

A. *Foreman, yes."*

(Tr. p. 117.)

"Redirect Examination.

Q. Under whose immediate order was Mr. Porter, the machine man?

A. No, the machine man had no orders to give to us at all, because he goes on shift, and he has to drill his rounds.

Q. And then he went off shift?

A. Yes, and then got off shift."

(Tr. p. 118.)

Frank Porter testified as follows:

"I am a miner and have been in the business four or five years. On December 9, 1911, I was employed in the Keane Wonder mine as a machine man, running a piston machine. I was working at the same place Cunningham was hurt. The first thing that I did on that day was to go to the place where they blast the day before, and after Mr. Roper come up and see what place to set out the machine, he say to go muck, clean him up; he give me Mexican help, and he say when I get through to set up my machine."

(Tr. pp. 118-119.)

"In the afternoon I broke one of the bolts on my machine, and I come past where Cunningham was at work to find a new bolt, and at that time it all cave down; it get me and I don't know what it was; they work like the devil and they begin to get me out."

(Tr. pp. 120-121.)

"Q. Do you know where the rock fell from?

A. From the roof.

Q. What kind of rock was it that fell?

A. Metalli. Well, I know it was ore. I don't know if the waste come down; I know it was ore because it drill that way—the piston machine it take about six or seven foot, and after, when you get inside, about six or seven or eight foot, *use the Waugh machine to knock down the roof*. The first thing you get the piston machine set up, and after seven or eight foot high, you use the Waugh machine, cause the ore is too high, cause you can't set up your bar if it is too high."

(Tr. p. 121.)

“There were no stulls in the place where the rock fell.

Q. How far from the place where this rock fell was the nearest stull?

A. Well, there was that two timbers in the chute, afterwards the pillar—there was one pillar afterwards—some stull on the other side, some stull where you dump the car.

Q. Then the pillar you refer to was between the chute and the other stull you mean?

A. Yes, there was one pillar after this side—the other side that stope—the other side the other stope there was some timber.

The COURT. Perhaps you understand it; I don't.”

(Tr. pp. 122-123.)

“Q. As a machine man in that mine, working as you say, under the directions of Mr. Roper, whose duty was it to bar down or pick down or sound the rock after a blast to see whether it was safe, or to make it safe—whose work was it—whose duty was it to do that?

A. Well, I have to do it; it was my place if you see any loose ground.”

(Tr. p. 124.)

Dr. M. R. Walker testified as follows:

“I am a practicing physician and surgeon, residing at Reno, Nevada. I made an examination of Cunningham and found that his left leg had been badly injured. In my opinion, the result of the injury has destroyed about seventy-five per cent of his efficiency as a common laborer.

Cross-Examination.

The result of the medical treatment given Cunningham has obtained reasonably good results.”

(Tr. pp. 124-130.)

J. W. Legate, deputy secretary of state, produced a document on file in the office of the secretary of state, filed June 15, 1907, being "Designation of State Agent Keane Wonder Mining Company".

(Tr. pp. 130-134.)

Whereupon defendant in error rested his case, and thereupon plaintiff in error moved the Court for a directed verdict or a nonsuit:

"2nd. Upon the further ground that the action is based upon a statute of the State of California of April 8, 1911, and that it appears from the testimony in this case that the injury upon which the action is founded occurred on the 9th day of December, 1911, in Inyo County, State of California; and that the act in question is contrary to the public policy of the State of Nevada, and therefore the Court will not, under the law of comity, permit the suit to be prosecuted in this state.

And for the further reason, under this subdivision of the motion, that it appears from the evidence that the mining property, and the place of business conducted and carried on by the Keane Wonder Mining Company, is in Inyo County, California, and that the defendant, Keane Wonder Mining Company, at the time of the accident was, and ever since has been, engaged in business in Inyo County, State of California, and has never removed from that State into the State of Nevada. So that the plaintiff, having the right of service of process, the prosecution of his cause of action in California, and the property of the Keane Wonder Mining Company being situated there, that a judgment recovered there could be enforced under the laws of the State of California, and cannot be enforced, if recovered in the State of Nevada.

4th. That the evidence in this case utterly fails to establish any negligence on the part of the defendant; that we have no evidence, except of the bare fact of an injury or accident, and that that does not establish negligence, either as proof or as a presumption, in this class of cases; and that the consequence of that upon this motion, standing in the nature of a demurrer to the evidence, it becomes a question of law for the Court, and not a question of fact for the jury."

(Tr. pp. 135-137.)

At this point we direct the Court's attention to the opinion of the learned trial judge in denying the motion. A careful reading of this opinion, we submit, clearly reveals the insufficiency of the evidence to establish any negligence of the Mining Company which in any way contributed to the injuries complained of.

This Court will note that every condition which, if established by evidence, might or would constitute a fact establishing or tending to establish negligence on the part of the Mining Company, is found by the lower Court either not to be established by the evidence, or if attempted, to be supported by such slight evidence as to amount only to an inference or a conjecture, and not sufficient in law to sustain the burden of proof which the law throws upon the party seeking recovery.

It is only in the last paragraph of the opinion that the Court below concludes that there is any testimony in the case showing negligence. The Court's conclusion in this regard will be discussed

hereafter, and we hope to be able to demonstrate that it is based upon an erroneous application of certain principles of law; in other words, the Court below, in effect, necessarily applied the doctrine of *res ipso loquitor* in determining that there was negligence on the part of the Mining Company.

For the Court's convenience, we quote the opinion of the Court below:

"I shall not go into this motion at any length. I will simply state as briefly as I can my reasons for overruling it. In my judgment, this action is not brought under the act of April 8th, 1911. The right to bring such an action was granted by previous law of California. Plaintiff here has simply sought to avail himself of the provisions of the act of April 8th, 1911, which deprives an employer of certain common-law defenses.

It is apparent that defendant has submitted itself to the jurisdiction of this court. What might have been the result if other action had been taken when the suit was brought, is unnecessary to say. Whatever objection defendant had to the jurisdiction of the court over its person has been waived.

The difference between the California statute and our own law is not sufficient to prevent this court from taking jurisdiction. It is a well-established rule in cases of this kind that a defendant cannot be compelled to pay damages, and there is no case against him, unless the injury resulted from negligence. While the injury itself, under some circumstances, is evidence of negligence, it must appear, in order that it may have that effect, that the accident could not have occurred, unless there was negligence on the part of some one—unless from the happening of the accident, it is very prob-

able that it could not have occurred except by the negligence of the defendant.

Much has been said in the course of the trial about the failure to promulgate rules. There are many decisions holding that the failure to promulgate rules is negligence, but when counsel for plaintiff was asked during the argument what rule could have prevented this accident, his only suggestion was a rule forbidding employees from going into dangerous places. Such a rule would hardly be serviceable. If defendant is to be held for negligence in failing to provide a rule, some connection must be shown between failure to provide a rule, and the accident; it must appear, in some way, that the failure to provide a rule caused the injury.

If the company had been negligent in the construction of its hoisting works, for instance, it might have been the grossest sort of negligence, but it could not be regarded here as a reason why the plaintiff should recover, unless it were shown that the defect in the hoisting works in some way caused this ore to fall.

There is no showing that any of the employees were incompetent. Much was said about the failure to give warning. When the duty to warn is present, it necessarily predicates, not only that there is danger, and reasonable cause therefor, but it also predicates the fact that the party upon whom the duty is laid, must know of the danger, or must have some cause to apprehend it, or could have discovered it if he had performed his duty.

There is no evidence here showing conclusively that the defendant failed to inspect this roof. True, Mr. Porter says it was his duty to do it, and there is testimony showing that Mr. Roper didn't do it; still it is not necessary that the company should have performed its duty through these people. Mr. Wilson himself

might have performed the duty; others might have performed it, hence the failure to inspect does not seem to me to have been established.

It appears from the testimony that the accident was caused by the falling of a body of ore—something like sixty tons—which it is alleged could not have occurred if the roof had been properly supported. This no doubt is true. If there had been a support under the ore, it probably would not have fallen, but, so far as the evidence shows, such an accident never occurred before. It does not appear from the testimony that any ore or rock ever fell from the roof of that chamber before. The chamber was in the neighborhood of six hundred feet in circumference; it must have been something like two hundred feet in diameter. At points, the roof was twenty feet from the floor; at others it was in the neighborhood of sixty feet. The supports and pillars were few in number; but, in the absence of any showing that these were insufficient, I do not see how we can assume there was any negligence on that score. If it had appeared that caves were frequent, then there would have been evidence tending to show the company was negligent in failing to have proper supports for the roof, but there is nothing of that sort here.

It seems to me the only testimony conveying a definite idea that defendant was negligent, was the falling of the ore body itself. It is not my duty to weigh the testimony; it is simply for my determination, as a question of law, whether there is any testimony showing negligence. Now, here is a large chamber; at the point where the accident occurred the hanging-wall was twenty-five feet above the foot-wall, and an enormous body, sixty tons of ore, were left on the hanging-wall. It seems to me

that in itself, was negligence; at least it is a fact tending to show negligence. On the existence of that fact I hold there is testimony here showing negligence. The motion is denied."

(Tr. pp. 137-140.)

EVIDENCE INTRODUCED BY PLAINTIFF IN ERROR.

Homer Wilson testified as follows:

"I reside at Keane Wonder, California. I am the President and General Manager of Keane Wonder Mining Company. I am thoroughly familiar with the underground workings of the mine, and was familiar with them on December 9, 1911. John Keith is the Superintendent, and George Roper the foreman.

On the day after the accident to Cunningham, John Keith and I went into the mine and made a map of the underground workings by actual survey.

(The witness produces map.)

I know of my own knowledge that this map is absolutely accurate and correct."

The map was introduced in evidence, marked "Exhibit A", a copy of which is attached to, and made a part of the transcript at page 265.

The witness also produced a map representing the cross-section through tunnel No. 5, and a cross-section map through shafts and tunnels numbers 1, 3 and 4, which was introduced in evidence and marked, respectively, "Exhibit B" and "Exhibit

C", copies of which are attached to and made a part of the transcript at pages 266, 267.

(Tr. pp. 142-144.)

"On December 9th there were three piston machines in operation in the mine."

Witness located on the map the place where Porter's machine was operating, and marked same by the letter "P" and a cross. Also marked on the map place where the machine was operated by Mack with the letter "M"; and likewise marked with a cross, the place where the third machine was operating (Tr. p. 151).

"I was not in the mine at the time of the accident, but that was in the stope the day before, and also the next day at about ten or eleven o'clock in the forenoon, and that I observed the rock or ore or waste which had fallen down."

The witness marked on the map "Exhibit A", the letters "X Cave" at the point where the rock fell (Tr. p. 152).

"The circular marks on the map near the place marked 'X Cave' represents the pillars left in the mine for the purpose of supporting the roof, varying in size from ten to twelve feet in diameter, and that the distance between the foot and the hanging-wall, at or about this point, was about twelve feet. That this distance would vary in the mine from eight to fifteen feet; seldom more than fifteen feet, and seldom less than eight feet, and the distance is not absolutely the same."

(Tr. p. 152.)

That there was no point in this level where the cave occurred where the distance between walls exceeded fifteen feet.

“Q. Was there any point from the foot to the hanging-wall that was fifty or sixty feet?

A. No, sir.

Q. Had you observed any danger in that point it fell, at any time previous to this?

A. No, sir.”

(Tr. p. 153.)

“I was at the point of the accident the day before, in the forenoon.

Q. *Had there been any caves immediately preceding the 9th of December, 1911?*

A. No, sir.

From the hanging-wall on the 8th of December, 1911, there was no schist falling at the point where these people were at work on the 9th.

Q. When you were in there on the 8th of December, 1911, what, if anything, did you observe that indicated any possibility of caving at the point where the cave took place on the 9th of December?

A. No, there was no indication.

Q. On the 8th of December, 1911, when you were in there, was there anything which came to your knowledge that indicated the possibility of caving at the point where this accident occurred?

A. Nothing.

Q. How long were you in there on the 8th, through this fourth level?

A. Oh, about an hour.

Q. Was any complaint made to you?

A. No, sir.”

(Tr. p. 156.)

“No request was ever made to me by plaintiff for safer conditions in the mine than had existed at the time the accident occurred, nor by any other employee. Pillars were left to support the hanging-wall to prevent it from caving. *The point where the caving took place was close to pillars, I should say ten or twelve feet from the pillar. The longest distance from one pillar to another at the point where plaintiff was working on the 9th, is twenty-three feet by actual measurement.*”

(Tr. p. 157.)

“I gave no instructions for the making of the switch to that track; that was Mr. Roper’s business. I was not with Mr. Roper in the mine on December 8th; he was busy at his work. I was with John Keith, the superintendent. He and I would usually go through together. I would always see Mr. Roper in the mine and talk with him. On the 8th I was at the place where every machine was in operation. It was my business to see if there was any change, or what the conditions were.

Q. *Did you make any examination of the hanging-wall of the stope on the 8th?*

A. *I always looked at the hanging-walls every time I would go in the mine.*”

(Tr. p. 161.)

“Q. *You would look at them?*

A. *Always, yes, sir; and look at them carefully to see if I see anything that looks dangerous, and I would call Mr. Keith’s attention to it.*”

(Tr. p. 162.)

“Q. On the 8th of December, how did you get up to the hanging-wall to examine it?

A. Oh, I didn't have to get up to it; you could look at it, throw your light on it and look at it.

Q. You didn't go to it at all?

A. No.

Q. *Did you use a sounding bar on it?*

A. *At times, in places.*

Q. *Did you on the 8th of December?*

A. *In several places, yes, sir.*

Q. On the particular place where this cave occurred?

A. No, sir, I didn't.

Q. The only way you examined it on that day was to hold your candle up, was it?

A. Yes, and look at it."

(Tr. p. 164.)

"I don't know of there ever having been any caves in that stope prior to December 9th. Occasionally there would be a slab of schist drop off the hanging-wall in the worked out portions."

(Tr. p. 166.)

"The pitch of the vein varied at different places; sometimes it would pitch fifteen degrees, sometimes ten degrees, and sometimes it would be about flat. It was never entirely flat—always had some pitch to it.

The pillar nearest to Cunningham and the one against which Porter was injured, is marked on the map Exhibit 'A' by the letters 'N P', and the nearest pillar from that is marked by the figures '23'. The diameter of the pillar 'N P' was at least twelve feet; pillar 23 was a long pillar; it was probably eight feet in diameter, and twelve or fifteen feet long."

(Tr. p. 168.)

“In this mine the ore is of that thickness we cannot take it all down with the piston machines; we have to follow the piston drills with a Waugh machine, and after the ore left on the hanging-wall is drilled, they are loaded and fired, and that drops the ore down from the hanging-wall.”

(Tr. p. 169.)

“The ore in this mine is very hard, and it takes a special powder to break it down. Special holes have to be drilled so we can break it; it breaks very hard. *The ore left on the hanging-wall, after the ore below is removed with the piston machines, cannot be got down without the use of the Waugh machine and dynamite.*”

(Tr. pp. 170-171.)

George Roper, the foreman at the time of the accident, testified:

“I have been engaged in mining all my active life,—nearly forty years.”

(Tr. pp. 171-172.)

“On December 9, 1911, I had full charge of the mine, hired and discharged men, and supplied anything that was needed at the mine.

It was the duty of the muckers in that mine to make a clean place, so that the miner or machine man would have a clean place to set up. At no time did the machine men ever carry or handle any muck in that mine.”

(Tr. p. 174.)

“There were pillars left in that mine to support the hanging-wall. There was also stulls. A stull is a 6x6 or 8x8 timber, with a headboard

on top of it, and wedged into place so as to support the hanging-wall and to prevent any slab that might be loose up there from coming down.

Q. Now, who placed the stulls that were placed in the Keane Wonder Mine?

A. The muckers.

Q. The muckers?

A. Yes.

Q. Is there a single stull placed in that mine that was ever placed there by any machine man?

A. No, sir, not one.

Mr. Perez was about the best mucker I had, and as a rule I had him do some of the timbering, and Matt Dropulich was another one,—those two gentlemen sitting in the back of the court-room—they were the men who put in the stulls.”

(Tr. pp. 175-176.)

The witness identified Map Exhibit “A” as a correct representation of the underground workings of this level on December 9, 1911, and indicated on the map the place where the cave occurred, being the same point indicated by Mr. Wilson (Tr. pp. 176-177).

“There were eight or nine stulls placed in that level right alongside of the track over which Cunningham and Perez operated their cars on December 9th. Perez put in most of these stulls. There was lagging on the inside up to about five feet, as I intended to make a fill at this point to support the hanging-wall, so as to enable me to draw these pillars later on.”

(Tr. p. 178.)

“Q. What was the space between the pillar marked ‘N P’ and the stulls?

A. Well, not to exceed five feet and a half. This space was used for the car-track.

Q. *Were there any other stulls in that mine other than those you have just enumerated?*

A. *Oh, yes, there is stulls all over. Where the quartz is hanging we don't need any.*

Q. State, if you know, the distance between the foot-wall and the hanging-wall at the place where plaintiff is alleged to have been injured.

A. *Thirteen feet four inches."*

(Tr. p. 179.)

"On the day that plaintiff was injured, I was in and out of the mine all day long. I was in the mine about fifteen minutes before the accident. About that time Porter's machine was not running, and I went over to see what was the matter with it. I found that it wanted some new rings, and I told him to take it off the bar and take it outside to the blacksmith shop, and I went outside with him and repaired it. Porter carried it out. I told him to go back and load his holes, as there was nothing else for him to do."

(Tr. pp. 180-181.)

"Q. Is there any reason that you know why Mr. Porter should be down between pillars marked 'N P' and '23' at or about the time that plaintiff was injured?

A. None that I know of.

Q. If he had obeyed your instructions, he would have been at a point marked "X Y", is that right?

A. Yes, sir.

Q. And at the time of the accident you had Mr. Porter's machine out in the blacksmith shop repairing it?

A. Yes, sir."

(Tr. p. 182.)

"The mine was equipped with tools and implements, the same as any mine; had long bars of steel to bar down the backs.

Q. Will you state to the jury what you mean by barring down the backs?

A. Well, if there is a slab, or anything left on the roof, and if we see a little, we try to get it down with those bars; and if we can't get it down and think it is dangerous, as a rule we put a stull in it; but we always pull them down if possible.

Q. Now, who pulls them down?

A. Well, the muckers, of course."

(Tr. p. 183.)

"I was through this mine six or seven times at least daily. It was my main duty to see that the mine was kept safe—watch the roof, and see that the men did their work.

Q. And did you fulfill your duties?

A. To the best of my ability.

I did not at any time while in the employ of the Keane Wonder Mining Company, and particularly on the 9th day of December, 1911, see anything in the nature of the hanging-wall, or any ore on the hanging-wall, that would indicate to me in any shape, manner or form that there was any likelihood of the ore falling, with the possibility of injuring any employee in the mine.

I know the general character of the ore in this mine. It is known as bull quartz. It is very hard, and in about the middle, a little up above the middle, there is a seam that carries a small part of galena, and that has caused a cleavage; up to that seam we take it out with the piston drills, and then afterwards, why we take down what is known as the backs—that is the quartz that is left—with the Waugh drill. The lower part of the ore body is taken out by piston drills, by putting in the holes,

loading them, and breaking away the ore below the cleavage. The ore above the cleavage is left on the hanging-wall."

(Tr. pp. 184-185.)

"After the lower portion of the ore is removed, the upper body of the ore is removed by using Waugh drills. We drill in that ore; the holes we drill are designated as "uppers".

Q. Why is it necessary to drill holes in ore on the hanging-wall—why does it not fall down naturally?

A. You do pretty well to shoot it down; it takes a good many holes; you can't put those holes above eighteen inches apart; the quartz is very tough; even after you do break it and shoot it, sometimes it is almost impossible to bar some of it down; it holds together, you know; it is big, bulky stuff, therefore it is very tough—very tough to break. We have broken down the upper portion, that is, the portion on the hanging-wall, with the bar after it has been shot; not before."

(Tr. p. 185.)

"Q. Can you state to the jury what area, if any, or what extent you have removed the lower portion of the ore below the cleavage or seam, allowing the ore on the hanging-wall to remain?

A. Well, after this accident. I shot a place out there larger than this room, without even a pillar at all in it, and left the ore all hanging, and then I drilled a series of holes all the way round and shot it all down, a little over fifteen hundred tons at one time. This was ore that was left on the hanging-wall, and we took it down with the Waugh drill.

Q. Before that was taken down, of course the ore beneath had been removed?

A. All been removed.

Q. *And the miners and muckers were at work under the hanging ore all the time that the lower body of ore was being removed?*

A. *All the time. The ore removed by the piston machines varied from six to seven feet."*

(Tr. pp. 185-186.)

"The average size of pillars left to support the roof, for the protection of the employees, would average about ten feet in diameter. In the immediate vicinity where plaintiff was injured, I think there is five or six pillars. There were two pillars right there, and they are there now."

(Tr. p. 187.)

"The general length of the timbers provided by the Company for use as stulls was about twelve feet. The longest stull in the mine is in the old pickey-pokey, fifteen feet ten inches."

(Tr. p. 188.)

"After the accident I went into the mine about seven o'clock. I saw the cave and the results of it. Where the rock broke off right next to a pillar, it was thirty-eight inches thick, and from there it ran out to a taper point, about fifteen feet out. At the present time, from the foot-wall right to the top where it fell down, is thirteen feet four inches. I measured it."

(Tr. pp. 189-190.)

"I told Cunningham and Perez where to work. They were supposed to be working at a point I presume sixty or sixty-five feet from the place where the cave occurred. *I saw the car used by them when I went back that evening.*

I examined the car as soon as I went into the mine. It was about sixty-five feet from the cave. The car was in the same condition as it always was. It was about one-third full of quartz. It was in good running condition and was not damaged."

(Tr. pp. 192-193.)

"On the day of the accident I went right underneath the place where the cave occurred at least six times. I didn't see anything that indicated to me in any way that there was any danger from a cave of the hanging-wall."

(Tr. p. 193.)

"About two days before Mr. Perez and me tried to bar down the ore left on the hanging-wall with two long bars, but we could not budge it.

Q. And why did you cease in your attempts to take it down?

A. Well, we came to the conclusion that there was only one way to ever bring it down, and that would be to drill it and blast it down.

Q. At that time when you ceased your labors, state whether or not you considered it safe or unsafe in the position in which it remained?

A. We considered it safe."

(Tr. pp. 194-195.)

"Q. What was the method adopted, the usual and customary method in the Keane Wonder Mine for ascertaining whether or not any ore on the hanging-wall was safe or unsafe?

A. Well, if we had any idea—we were all of us looking at it all the time—and if we had any idea anything was unsafe, *I would take and get a pick and sound it to see if it was drummy or not, and if it was, and we could find a crack there in it any where, we would try to pull it*

down; otherwise we would have to take and put a stull under it for safe keeping.

Q. When would you put a stull, under what circumstances would you put a stull under the portion?

A. Well, it would have to be a little away from a pillar, because if it was drummy right over a joining in a pillar, you know, a pillar was just the same as a stull, it would hold it."

(Tr. p. 195.)

"The point where the accident occurred, the ore below had been removed at least two months before the rock fell."

(Tr. p. 197.)

"The reason why we left this ore projecting out further from another portion of the face of the ore was because it helps hold the roof.

In my judgment, not to exceed five to seven tons of ore fell at the point designated as the cave. There was a little quartz mixed in it, but it was chiefly schist."

(Tr. p. 199.)

"I saw Cunningham and Perez working in the mine on the afternoon of December 9th. They were working at the point which I have indicated on the map by the word "car", which is sixty-five feet from the cave. *No mining had been done in and about the place of the cave for at least two months.*"

(Tr. pp. 200-201.)

"About fifteen or twenty minutes before the accident, Cunningham and Perez were shoveling ore into a car. They were working under a solid body of ore, and were mucking the ore which had been removed by the piston machines.

The upper part, ranging all the way from six to seven feet, was on the hanging-wall; it had not been shot down. This point was at or near the point indicated on the map and marked 'car'."

(Tr. pp. 203-204.)

"I had a conversation with Cunningham in reference to his employment with the Mining Company. He asked me to give him the next machine. I asked him if he could run one. He said he could run one as good as any man in the mine. Well then I says 'I will give you the next machine'."

(Tr. p. 204.)

"The distance between the foot-wall and hanging-wall, by actual measurement, is thirteen feet, four inches, and this measurement will hold good for an area of at least two acres around the place of the cave.

There was no necessity or reason that I know of, that Cunningham should be at the point where the cave took place. There was no necessity for doing anything there. He should have been at the place marked 'car', helping Mr. Perez to fill it."

(Tr. pp. 206-207.)

"The first thing I did on entering the mine after the cave was to go over and look at the exact places where the men got caught. I had the men that took them out show me the exact places where the men got caught. The men who showed me were Louis Guerra and Mr. Perez and others; there was half a dozen of them; they went with me. There were at least a dozen men there at the time looking at the place where the cave took place. There was a miner named Ed Williams there. He is the

man sitting in the court-room back there. *Mr. Perez and Mr. Guerra pointed out the places where Cunningham was injured. He was caught up against the pillar marked 'N P', and Porter was caught up against pillar marked '23'.*

It was the duty of the miners employed by the Mining Company to get their places cleaned out, and if there was any loose above them, their first duty was to look at it, and then get the machine up as quick as possible, and of course pick it down and make it safe for themselves. It was a man's duty to see that it was safe over his head; that is any miner's duty."

(Tr. pp. 208-209.)

"Cross-Examination.

I had four men working on night shift. They were muckers; no machine men."

(Tr. pp. 215-216.)

"The reason I had muckers mucking of a night was to do that work, and clean up—always had a clean place to set up. Of course, *when the machine man went, he would take and sound on the roof above him, and if there was any loose he would tear it down; and he would do that for his own protection; and if there was any loose in the face, he would pick it down, but as a rule that was all done before he went there.*"

(Tr. p. 216.)

"Q. You say the machine man would sound to see if there were any loose slabs or anything?

A. Certainly.

Q. And if there was a slab that looked as if it was loose, and he sounded it, would that always sound drummy?

A. It would if it was loose. Anything less than five or six feet in thickness, *if loose, will sound drummy; if it is loose you can always tell.*"

(Tr. p. 217.)

"The row of stulls for the proposed false pillar *was within eighteen inches from the track.* Perez put in nearly every one of these stulls.

Q. Now, I understand you to say, in answer to a question of Mr. Jarman's, there never had been any caving in that level before?

A. Not in the level before, no, sir; not during the time that I was there.

Q. Well, that is what I refer to, to your knowledge.

A. Yes.

Q. And how long were you there before December 9, 1911?

A. Oh, possibly ten or eleven months.

Q. Do you know of any slabs having sloughed off without having been helped with human agency?

A. No.

Q. You were thoroughly familiar with everything that happened in that stope during that ten or eleven months, were you?

A. I was."

(Tr. pp. 220-221.)

"Q. In each and every instance when you shot the holes drilled by the Waugh drills in an ore body above the seam, and hanging upon the hanging-wall, did those shots in every instance during that ten or eleven months break clean all the ore from the hanging-wall?

A. Good Lord, no.

Q. As a matter of fact then, after the shooting of the holes drilled by the Waugh drills, there would be ore bodies remaining, unbroken, from the hanging-wall at times?

A. At times, yes.

Q. And those you got down by barring?

A. By barring, yes."

(Tr. p. 221.)

"Redirect Examination.

The rock that fell down struck the floor, and the large lumps rolled over and caught Cunningham—caught his leg, and pinned him up against the pillar.

Q. Do you know what the effect would have been if that lump of rock had struck a man who was directly underneath it?

A. Broke every bone in his body."

Edmund Grimani, a miner for twelve years, and at the present time foreman at the Keane Wonder Mine, testified as follows:

"I worked in the mine three years as a miner, operating a piston machine. I quit on November 14, 1911, and returned in March, 1912, being absent on a vacation. When I quit, pillar 'N P' was already cut, and there was a track between pillar 'N P' and the place marked '23', at which I was at work at the time. The last time I was in the mine at the place of the cave was on the 16th of the present month, the day before I left to come here as a witness. I don't know of my own knowledge where the place was; I only know what has been told me. That place is where the cross is marked, near the pillars 'N P' and '23' on the map Exhibit 'A'. The ore in that mine is pretty hard breaking ground; in fact, it was ground that you could not make no headway without a machine; pretty tough breaking ground; you had to have holes pretty close together, that is, about eighteen inches, from that

to two feet, in order to get a good show to break.

Q. Did you work on the ore above what you took out?

A. Not on the ore above, no, sir. *There was no specified distance how far we would continue working in the ore body with piston machines with the ore remaining overhead. Sometimes the Waugh machine would be twenty to fifty feet away. We were always working with the ore above our head.*

Q. Now, why didn't that ore fall down of its own weight?

A. Well, it was pretty solid ground, there was no show for it to fall down.

Q. Could you bar it down?

A. No, sir.

Q. How did the Keane Wonder Mining Company get that ore down?

A. By a Waugh machine, drilling holes in it, loading the holes and shooting it down."

(Tr. pp. 231-232.)

"When I first go on shift I hunt around and look overhead, in fact, I look all around to see how the ground is; then I get in and rig up my machine and drill for the rest of the shift. If there is anything on the hanging, or near about there, I pull it down. I am referring to the place I am working in. I do not go to any other place in that mine and pull down any stuff or bar it down. That is done by anyone working in the place. *Each man generally looks after himself, that is, as to the particular place.*"

(Tr. p. 234.)

"Any person who goes to a place to work in the mine, naturally would look around to see whether there was any dangerous ground, and pull it down.

Q. Who else besides the machine men were employed in that mine during the time you were employed there?

A. Muckers. They muck out the ore, build tracks, put in stulls. I have seen muckers putting up stulls in that mine. They got the stulls on the outside of the mine. Sometimes they were kept out by the blacksmith shop, and sometimes down below by the tramway, where they came up."

(Tr. p. 235.)

E. W. Williams, a miner for twelve or fourteen years, testified:

"I was in the employ of the Mining Company on December 9, 1911. I know Cunningham, and I know the place in the mine where the cave took place. I am familiar with Map 'A', and the place of the cave is indicated by the 'X' near pillars '23' and 'N P'.

I went into the mine the next morning after the caving about 7:30 a. m. Mr. Roper and several more men went with me. After we got into the mine he showed us first where the cave took place. I found that the mixture of the hanging-wall, there was a little ore in it, not much—had caved down and rolled over between these two pillars, on both the switch and the track. There was four or five tons, I should judge. There was one pillar on each side of the switch, and then there were stulls on the opposite side of the track, opposite the pillars, toward the chute. The pillars were close to ten or twelve feet through; might have been a little longer one way than the other."

(Tr. p. 238.)

"I saw two cars in the mine. They were quite a little ways away from the cave; I should

judge from thirty to fifty feet. I examined one of the cars, the one in the switch.

Q. Why did you examine that car?

A. Because all of them went up and looked into it, most of the fellows—Mr. Roper and the rest of them.

Q. What did you find from examination?

A. Well, it was one-third to a half full of ore."

(Tr. p. 239.)

"I am familiar with the character of the ore in the Keane Wonder Mine; it is a very hard, solid quartz, about as hard as you find anywhere.

Cross-Examination.

I was not in the mine on December 9, 1911. On the morning of the 10th I saw a schist and ore pile there from five to six feet long it looked like; maybe scattered a little further than that, some of it, where it had rolled; some of it eight or nine feet. I should judge it was three and a half or four feet wide, possibly eight or nine feet long. Some rocks there might have been twenty-four to thirty inches thick. The tracks were not clear at that time; they were not completely covered; some ore on it and some not. I could tell from the look of the track that it had never been mucked away from the track. At that time there was nobody at work there; it was just before going to work, just the time everybody was going on shift. I stayed there probably fifteen minutes."

(Tr. p. 240.)

"The COURT. Mr. Williams, when you examined that pile of debris at the place where the accident is said to have occurred on the morning of the 10th, did you examine it with any care?

A. Yes, I did, because in a case like that anybody would naturally do it.

Q. Did you observe whether there was anything in there except schist and ore?

A. I didn't see anything there but that schist and ore.

Q. Did you see any tools there?

A. No, sir, I did not.

Q. No car there?

A. Not right at that spot, no, sir.

Q. If there had been any shovel there, would you have seen it?

A. I think I would if there had been any there. None of that pile of muck that had caved from the hanging-wall had been moved when I saw it, that I know of, and none was moved while I was there.

The COURT. It didn't appear, any of it, to have been moved, did it?

A. No, sir, it didn't appear any of it to have been moved. I am pretty certain of that."

(Tr. pp. 241-242.)

At this point, plaintiff in error (defendant in the Court below) rested its case.

Thereupon, defendant in error was recalled in rebuttal, and testified as follows:

"I have examined the map 'Exhibit A', and it does not represent exactly the condition and place of that track on the 9th day of December, 1911.

Q. Will you state what change could be made in the map where it is marked 'Switch', that part of the track, to make it represent the actual condition on the 9th of December, 1911?

A. Well, this main track should go up here (indicates).

Q. Should go up there?

A. And this is the switch marked off here, ain't it?

Q. Yes.

A. And them pillars, I don't understand them—that ain't the way it looked at that time."

(Tr. pp. 242-243.)

"During the time I worked in the Keane Wonder Mine I never put up or assisted in putting up a stull. I was never requested or instructed by Mr. Roper to put up a stull, nor was I ever informed by any person in authority that there were stulls in the mine or outside the mine that I was to use in case I saw a dangerous place in the roof.

Mr. MILLER. Plaintiff rests, if your Honor please."

(Tr. p. 244.)

Thereupon counsel for plaintiff in error renewed the motion previously made for a directed verdict on the grounds and for the reasons urged in the second and fourth paragraphs of the motion made upon the conclusion of the testimony of the plaintiff, which motion was overruled, and an exception allowed (Tr. pp. 244-245).

Thereupon the Court instructed the jury (Tr. pp. 245-260).

The foregoing is a full and fair resume of the evidence in the case; and while it may appear to this Court that there has been a needless repetition as to some matters, we have deemed it advisable to do so, and to set forth as much of the testimony as possible *in haec verba*, so that this Court will be

able to appreciate and understand the nature and character of the evidence upon which the jury awarded defendant in error the sum of twelve thousand five hundred dollars for injuries sustained by him by reason of the alleged negligence and carelessness of the Keane Wonder Mining Company, plaintiff in error.

II.

Assignments of Error.

The fourteen assignments of error may, for all practical purposes, be grouped into two divisions,—one raising the point of the insufficiency of the evidence to sustain the judgment, and the other raising the point as to the enforcement of a law of the State of California in the State of Nevada, which is radically and fundamentally different from the law of that state on the same subject.

The first group includes assignments of error 5, 6, 9, 10, 13, 14 and 15. Assignments 10 and 14 thereof are sufficiently typical to advise the Court of the point urged. They are as follows:

“X. The Court erred in denying defendant’s motion for a directed verdict at the conclusion of all the evidence in the case for the reason that there is no evidence that the alleged injuries to plaintiff were sustained by him within the State of California while engaged in the line of his duties or in the course of his employment, by reason of the want of ordinary or reasonable care of this defendant or of any

officer, agent or servant of this defendant, and that, in particular, there is no evidence:

a. Of any breach of a statutory duty;

b. Of any complaint by the plaintiff before said alleged accident that defendant's mine was unsafe or dangerous;

c. Of any knowledge on the part of defendant of a dangerous or unsafe condition of the mine or that the roof thereof was dangerous or was liable to fall;

d. Of any request by plaintiff or any other person that the roof of said mine be made safe;

e. Of any refusal or neglect by this defendant to make the roof of said mine safe after request made by plaintiff or any other person;

f. Or affirmative proof that even if defendant had made a more extended examination of the roof of said mine that the alleged defect might have been or would have been discovered by it;

g. Or affirmative proof that there was any loose rock or ore on the roof of said mine as alleged in said amended complaint;

h. Or affirmative proof of assurances by defendant to plaintiff as to the safety of the place where plaintiff was injured after objections thereto made by plaintiff to defendant;

i. Or affirmative proof that appliances used by defendant were insufficient or inadequate.

j. Or affirmative proof that any of defendant's employees were incompetent;

k. Or affirmative proof of any lack of supervision on the part of defendant;

l. Or affirmative proof that defendant failed to make proper tests to determine the safety of the roof of said mine;

m. Or affirmative proof that defendant did not do its full duty in making the said mine a safe place for plaintiff to work;

n. That injury to plaintiff resulted from any failure of defendant to warn him of any danger known to or which should have been known to this defendant;

o. Or affirmative proof that an extra pillar was needed or that any extra stulls or supports were needed at the place where the roof of the mine caved, or that defendant knew that any such were needed; nor is there any affirmative proof of any reason or cause which would or should have put defendant on notice that such pillars or stulls or supports were needed;

p. Or affirmative proof that had defendant placed the usual and customary stull or support at place where the roof of the mine caved that such stull or other support would have prevented the caving;

q. Or affirmative proof that any pillar in said mine was removed which should have been allowed to remain;

r. Or affirmative proof from any witness that any rock in said mine was loose and was known or should have been known to defendant prior to the time of the accident; and there is no evidence to show that defendant had any cause to know that any rock in said mine was loose and liable to fall, to the possible injury of any of its employees, nor is there any proof that this defendant had any reason from any cause so to believe.

XIV. That the said judgment so entered on the verdict of the said jury was contrary to and is against law because the undisputed evidence in the case conclusively establishes that the plaintiff was guilty of contributory negligence which resulted in his alleged injuries, and in this behalf that the undisputed facts in the case conclusively establish that the contributory negligence on the part of plaintiff was not slight and that of the employer was gross

in comparison. On the contrary, if there was any negligence established in the case on the part of plaintiff and defendant, that such negligence on the part of each was ordinary negligence and was not slight and gross by comparison but was equal."

The second group includes assignments of error 1, 2, 3, 4, 7, 8, 11, 12 and 14; and assignment 8 thereof is likewise typical of this point. It is as follows:

"VIII. The Court erred in denying defendant's motion for a directed verdict in its favor at the conclusion of all the evidence in the case for the reason that under the law of comity, the above entitled Court will not and should not entertain jurisdiction of this action of damages for alleged injury to plaintiff while in the employ of defendant in the State of California, in that the said statute of the said State of California, under which this action was and is prosecuted, to wit, Roseberry Employers' Liability Act, Cal. Stat. 1911, is contrary to the law and public policy of the State of Nevada upon the same subject."

Brief of the Argument.

I.

The argument for plaintiff in error will follow the foregoing grouping of the assignments of error.

A. Excepting as to the alleged element of negligence referred to in the last paragraph of the opinion of the learned Judge of the Court below, denying the motion for a nonsuit or directed verdict, we are of the opinion that no better argument

can be presented in behalf of plaintiff in error on the insufficiency of the evidence to sustain the judgment than the opinion referred to. We submit same to this Court as reasoning unanswerable, that the alleged elements of negligence referred to in the opinion and relied upon by defendant in error are wholly unsupported by the evidence introduced in his behalf, and therefore legally insufficient to sustain a judgment in his favor.

The opinion referred to is fully set out at page 30 of this brief, and is to be found in the transcript, pages 137-140.

In actions of this character there are certain elementary propositions of law which must be applied in reaching a correct conclusion of the problem presented. We have no doubt but that the Court is fully advised as to the law, but as a matter of convenience, we quote the following as being applicable to this case, and particularly to the point under discussion, as the law, not only of the State of California, but of the State of Nevada as well.

“In an action to recover damages for injuries sustained by an employe, the burden is on the plaintiff to affirmatively prove his employer’s negligence.”

26 Cyc. 1102;

Campbell v. Southern Pacific Co., 21 Cal. App. 175, 131 Pac. Rep. 80;

Patton v. Texas & Pacific Ry. Co., 179 U. S. 658; 45 L. Ed. 361.

“The burden is upon the injured servant to show that the machinery or appliances were

so defective or inadequate as to make the use of them by the employee negligent and culpable."

Lyman v. Mining Co., 140 Cal. 700.

"In an action for personal injuries it is essential that the servant should prove by a preponderance of the evidence, not only that the master was negligent, but also that his negligence was the cause of the injuries, and this obligation is not discharged by merely showing the existence of a defect or the happening of the accident or injury."

26 Cyc. 1415-16-17.

"Mere proof of the existence of a defect or the happening of the accident or injury is not, without more, sufficient to establish the master's negligence."

26 Cyc. 1446;

Madden v. Occidental Steamship Co., 86 Cal. 445; 25 Pac. Rep. 5.

"That evidence is deemed satisfactory which ordinarily produces *moral certainty or conviction in an unprejudiced mind*. Such evidence alone will justify a verdict. *Evidence less than this is denominated slight evidence.*"

Cal. C. C. P., Sec. 1835.

The rule in this regard is the same upon a statutory liability.

Labatt, Vol. 5, Sec. 1644.

"In an action by a servant against his master for personal injuries there is a *prima facie* presumption that the master was free from negligence."

26 Cyc. 1410.

Thompson on Negligence, Vol. 4, pp. 380-382.

“Where the evidence leaves the cause of an injury unproved, it cannot be attributed to the defendant’s negligence.”

26 Cyc. 1410.

“No presumption of negligence on the part of the master arises from the mere existence of a defect or the happening of the accident through which the servant was injured.”

26 Cyc. 1411;

Thompson v. California Construction Co.,
148 Cal. 35; 82 Pac. Rep. 367;

Brymer v. Southern Pacific Co., 90 Cal. 496;
27 Pac. Rep. 371.

“In the absence of evidence to the contrary the law presumes that the master has performed his duty with reference to furnishing his servants with reasonably safe places for work, and that he has no notice of any defects therein.”

26 Cyc. 1412;

Brymer v. Southern Pacific Co., 90 Cal. 496.

“In the absence of evidence to the contrary it will be presumed that the methods of work adopted by a master are proper and sufficient.”

26 Cyc. 1413.

“In a servant’s personal injury action where the circumstances show nothing as to the real cause of the injury, there is a failure of proof.”

26 Cyc. 1442.

“The master is not an insurer of his servant’s safety, but is only required to exercise such ordinary care and diligence as would be rea-

sonable in view of the work to be performed, and the dangers incident to the employment.”

26 Cyc. 1102;

Brymer v. Southern Pacific Co., ante;

Thompson v. California Construction Co.,
ante.

“It is a well-settled rule that the mere failure to inspect is not negligence where an inspection would only show what was already known to the servant and all others.”

26 Cyc. 1136-37.

“Actual or constructive knowledge by a master of the defective condition of his places for work does not make him liable for injuries arising therefrom, unless he has had a reasonable opportunity, after acquiring such knowledge, to remedy the defect.”

26 Cyc. 1141.

“An employee of mature years is presumed to be acquainted with the dangers incident to the service, and no duty rests upon the master to warn and instruct him as to the possible or probable dangers of the employment, where he is mature, intelligent, and experienced in the work, and the master has no notice or reason to believe that he is not fully competent and acquainted with such dangers.”

26 Cyc. 1172-73.

“It is not negligence for a master to set his servant to a piece of work where such servant is of sufficient age and intelligence to appreciate the risk which is both patent and incident to the particular work.”

26 Cyc. 1165;

Brett v. S. H. Frank Co., 153 Cal. 267.

“That one who is working in a place where he is exposed to danger must exercise his faculties for his own protection, and if he fail to do so he is not entitled to damages for personal injuries received.”

Kenna v. Central Pacific Ry., 101 Cal. 26.

“Having eyes he must use them, and being informed, he must act upon the information.”

Towne v. United Electric Co., 146 Cal. 770.

Applying the foregoing principles of law to the evidence, no other conclusion is possible than that reached by the learned Judge of the Court below, and in closing this branch of the argument, we submit the opinion of the late Mr. Justice Brewer of the United States Supreme Court, in the case of Patton v. Texas & Pacific Ry. Co., 179 U. S. 658, as in all respects an authority applicable to, and governing and controlling, the case at bar, and sustaining the contention made by plaintiff in error as to the insufficiency of the evidence to sustain the judgment.

In that case Mr. Justice Brewer said:

“It is undoubtedly true that cases are not to be lightly taken from the jury; that jurors are the recognized triers of questions of fact; and that ordinarily negligence is so far a question of fact as to be properly submitted to and determined by them.

Hence it is that seldom an appellate court reverses the action of a trial court in declining to give a peremptory instruction for a verdict one way or the other. At the same time, the judge is primarily responsible for the just outcome of the trial. He is not a mere moderator

of a town meeting, submitting questions to the jury for determination, nor simply ruling on the admissibility of testimony, but one who in our jurisprudence, stands charged with full responsibility.

* * * * *

*The fact of accident carries with it no presumption of negligence on the part of the employer; and it is an affirmative fact for the injured employe to establish that the employer has been guilty of negligence. It is not sufficient for the employe to show that the employer may have been guilty of negligence; the evidence must point to the fact that he was. And where the testimony leaves the matter uncertain and shows that any one of half a dozen things may have brought about the injury, for some of which the employer is responsible, and for some of which he is not, it is not for the jury to guess between these half a dozen causes and find that the negligence of the employer was the real cause, when there is no satisfactory foundation in the testimony for that conclusion. If the employe is unable to adduce sufficient evidence to show negligence on the part of the employer, it is only one of the many cases in which the plaintiff fails in his testimony; and no mere sympathy for the unfortunate victim of an accident justifies any departure from settled rules of proof resting upon all plaintiffs. While the employer is bound to provide a safe place and safe machinery in which, and with which, the employe is to work, and while this is a positive duty resting upon him, and one which he may not avoid by turning it over to some employe, it is also true that there is no guaranty by the employer that place and machinery shall be absolutely safe. * * * He is bound to take reasonable care and make reasonable effort, and the greater the risk which attends the work to be done, and the machin-*

ery to be used, the more imperative is the obligation resting upon him. * * *

No one can say from the testimony how it happened that the step became loose. Under those circumstances it would be trifling with the rights of parties for a jury to find that the plaintiff had proved that the injury was caused by the negligence of the employer.

The judgment of the lower court directing a verdict for the defendant, affirmed."

B. The reasoning of the learned Judge in denying a directed verdict is erroneous *because negligence is assumed and not proved*, and is predicated solely upon the evidence that a body of ore was left on the hanging-wall, and that it fell and injured the defendant in error.

The decision of the lower court can only be upheld by the application of the doctrine *res ipsa loquitur* which is contrary to the established law of the State of California.

For the Court's convenience we again quote that part of the opinion referred to:

"It seems to me the only testimony conveying a definite idea that defendant was negligent, was the falling of the ore body itself. * * * Now, here is a large chamber; at the point where the accident occurred the hanging-wall was twenty-five feet above the foot-wall, and an enormous body, sixty tons of ore, were left on the hanging-wall. It seems to me that in itself, was negligence; at least it is a fact tending to show negligence. On the existence of that fact I hold there is testimony here showing negligence. The motion is denied."

(Tr. p. 140.)

There is no pretense of evidence that the Mining Company violated any statutory duty in allowing ore to remain on the hanging-wall, nor of any complaint by defendant in error, or any other person, that by reason thereof the mine was unsafe or dangerous; nor is there any evidence of knowledge on the part of the Mining Company of the alleged dangerous or unsafe condition of the mine, or that the roof thereof was dangerous, or that it was liable to fall; there is no evidence of any request by defendant in error or any other employe that the roof of the mine be made safe, nor is there any evidence of any refusal or neglect by the Mining Company to make the roof of the mine safe after request by defendant in error or any other person, or to take down the ore which fell, or to place a stull under it so as to protect the roof at that point; nor is there any evidence in the record that even if the Mining Company had made a more extended examination of the roof of the mine that it might have, or could have discovered that the ore which fell was loose, or that it was likely to fall and injure its employes, *nor is there any evidence whatever in the record that there was any loose rock or ore on the roof or hanging-wall of said mine, as alleged in the amended complaint. On the contrary, the positive testimony is to the effect that the rock which fell was solid and firmly attached to the hanging-wall, and that so far as the knowledge of those in charge of the mine was concerned, including defendant in error and his witnesses, the only way to take down the ore*

was to drill holes and shoot it down by dynamite; there is no evidence that the Mining Company ever gave any of its employes any assurances as to the safety of the place where defendant in error was injured, after objections thereto made by defendant in error, or any other person; there is no evidence that the appliances used by the Mining Company were insufficient or inadequate, or that any of its employes were incompetent; nor is there any evidence of any lack of supervision by the Mining Company. On the contrary, the evidence of the witnesses of defendant in error affirmatively establishes daily supervision and inspection by the employes of the Mining Company; there is no evidence whatever that the Mining Company failed to make proper tests to determine the safety of the roof of its mine at the point where Cunningham was injured; there is no evidence whatever that the injury to Cunningham resulted from any failure of the Mining Company to warn him of any danger known to, or which should have been known to the company; nor is there any evidence whatever, directly or indirectly, to the effect that an extra pillar or stull was needed at the place where the roof of the mine caved, or that the Mining Company knew that any such were needed; nor is there any evidence of any fact which would, or should have put the company on notice that pillars, or stulls, or supports, were needed at that point in order to prevent a caving, and a possible consequent injury to its employes; nor is there any evidence that had the Mining Company placed

the usual and customary stull or support at the place where the roof of the mine caved, that such stull or other support would have prevented the caving; nor is there any evidence that the Mining Company failed to leave the requisite number of pillars necessary to properly support the roof of the mine, and there is no evidence that any such pillar was removed by the company which should have been allowed to remain, and by reason of which the cave resulted which caused the injury. And finally, there is no evidence whatever that any rock or ore in said mine was loose, and was known to the company, nor of any facts indicating, directly or indirectly, that the company should have known that same was loose prior to the time of the accident, nor is there any evidence that the Mining Company had any reason, from any cause, so to believe.

In the absence of some such evidence, the mere fact that the ore fell from the hanging-wall and injured defendant in error is proof of an accident, nothing more, and nothing less, for which no legal liability attaches to the master.

The fact that there is an absence of evidence in the particulars enumerated compels the Court, as a matter of law, to decide in favor of the Mining Company, in accordance with the presumptions hereinbefore referred to. Therefore, in the case at bar, the Court is bound to say, from the evidence introduced respecting the falling of the ore, that no question of negligence therefor can be imputed to

the Mining Company, and the presumption that the master has performed his duty with reference to furnishing its servants a reasonably safe place to work, and that the master had no notice of any defect or of any condition in any way indicating that the ore or rock was liable to fall, must obtain. If the matter ended here, there could be no question but that the evidence is wholly insufficient to sustain the judgment.

The learned Judge of the Court below was impressed with three additional facts, to wit:

(1) A large chamber.

(2) Hanging-wall twenty-five feet.

(3) Enormous body left on the hanging-wall, to wit: sixty tons.

These three facts, coupled with the fact that the ore actually fell, and injured Cunningham, were held sufficient proof of negligence to warrant the case being submitted to the jury, and consequently, sufficient to uphold the verdict in favor of defendant in error.

We propose to discuss the facts in the order named.

(1) A LARGE CHAMBER.

It is difficult to perceive how this fact, standing by itself, in the absence of affirmative proof that the hanging-wall or roof was not supported by the requisite number of pillars or stulls, is or can be

construed as constituting any element of negligence on the part of the Mining Company. The size of the chamber or stope is of no consequence, provided that it is supported by pillars, or otherwise, in such manner as the judgment of reasonable men, operating under like circumstances and like conditions, would dictate. If the fact that a cave occurred in a large chamber was an element of negligence, *non constat* it would be a complete defense in a similar action if the cave occurred in a small chamber or stope. The size of a chamber or stope is of no consequence whatever. For it is a well-known fact that no two mines are in all respects similar concerning timbering. What would be adequate timbering in one mine would be wholly inadequate in another. What is, or is not, adequate timbering in any given mine, depends wholly upon the nature and character of the formation of the particular mine.

The care which the law charges the Mining Company in respect to the operation of its mine, is in a measure commensurate with the requirements of the mine itself, which are easily proved.

The evidence in this case affirmatively establishes that very little, if any, timbering was required in this mine. There is no evidence of any caves prior to December 9, 1911. As a matter of fact, the uncontradicted evidence establishes the fact that a great ore body had been taken out prior to that time without injury to any employe, and there is no evidence that the Mining Company conducted its min-

ing operations on December 9, 1911, in respect to timbering, in any manner different from prior operations.

It is manifest, therefore, that so far as the evidence in this case is concerned, the fact that defendant in error was injured in what the learned Judge was pleased to term "a large chamber", or a large stope, by itself, is of no consequence whatever as establishing negligence on the part of the Mining Company.

The answer to this proposition is solved by the testimony of defendant in error, when he testified as follows:

"The pillars are part of the ore left to protect the mine. It stands there a solid body of ore to hold up the roof of the stope.

Q. And where there is one left there is no use for any timbers, is there?

A. Oh, yes; you have got to timber it.

Q. Always, do you always have to timber it?

A. *It all depends on how wide them pillars is.*

Q. *Precisely; and the width of the stope.*

A. *And the width of the stope."*

(2) HANGING-WALL TWENTY-FIVE FEET.

In disposing of the motion in the Court below the learned Judge assumed as a fact that the distance from the foot-wall to the hanging-wall was twenty-five feet, and no doubt this assumption was based upon the positive testimony of Cunningham, on his direct examination, when he testified that

"The thickness of the ore at the place where I was injured, from the foot-wall to the hanging-wall, was close to twenty-five feet."

On cross-examination the witness testified that *he had never measured the distance, nor seen it measured, and that he was just guessing.* He also testified that the *chute timbers ran clean up to the hanging-wall, and that they were about ten feet* (Tr p. 86).

Matt Dropulich, a witness for defendant in error, testified that the space between the floor of the stope and the roof, is from fifteen to twenty feet (Tr. p. 93).

A. Perez, also a witness for defendant in error, testified:

“I guess the distance between the foot-wall and the hanging-wall at the place where Mr. Cunningham was injured was may be from fifteen to twenty feet.”

(Tr. p. 117.)

Frank Porter, also a witness for defendant in error, inferentially stated the distance to be from ten, or fifteen or twenty feet.

(Tr. p. 121.)

Inasmuch as it clearly appears from the evidence that the testimony of the witnesses in reference to the distance between the walls was a mere matter of estimate or guess, and there being no evidence to the effect that defendant in error was ever denied permission to make examination of the stope and to obtain the exact measurements, the Court below can only say, as a matter of law, that the distance between the walls is fifteen feet, and no more. To hold otherwise would make justice a farce, and

would encourage perjury. There is no evidence in the case that the mine, at the point of the injury, has been destroyed, or that it has in any way been changed. On the contrary, the testimony of the witnesses for plaintiff in error was to the effect that the mine was in identically the same condition at the point of the accident as it was on December 9, 1911.

The fact, therefore, assumed by the Court in determining this motion being one capable of exact measurement, and over which there should not be any dispute, when it becomes a material fact before a court, is obviously unwarranted, even from the testimony of the witnesses of the defendant in error.

While it is true that the exact distance between the walls at the point referred to was not in evidence as a part of defendant in error's case, yet it was proved by the testimony of George Roper, the foreman in the mine at the time of the accident. *He testified that the exact distance was thirteen feet, four inches, and that he measured it.* His testimony in this regard was not contradicted, and inasmuch as our motion for a directed verdict was renewed at the conclusion of all the evidence in the case, for the purpose of disposing of this motion, this Court should take as a fact that the ore which fell was attached to the hanging-wall thirteen feet four inches from the foot-wall. Positive testimony of a physical condition existing at the time of trial (and now existing), must control in any court. The

actual distance between the walls can readily be harmonized with the testimony of the witnesses referred to, in estimating same to be about fifteen feet, but it is inconceivable that an unprejudiced and unbiased witness can be so far mistaken in estimating the height of a place in which he had been at work for several days, as to testify that the distance was twenty-five feet, when the actual distance is but thirteen feet four inches. If this is any standard of the accuracy of the testimony in behalf of defendant in error, it is obvious that his case is far weaker than that which appears on the face of the record itself.

Now that we have the true distance between walls at the point of the accident, we respectfully submit that the distance itself, in the absence of testimony as to the nature and character of the rock or ore remaining on the hanging-wall, as being likely to fall or moved by the elements, or any other cause, and which plaintiff in error knew, or by the exercise of reasonable care should have known, is of itself no evidence of negligence. It is obvious that the danger from ore remaining on the hanging-wall is not the distance from the foot-wall to the ore itself, but the nature and character of the ore and the hanging-wall. If there were evidence in this case that the hanging-wall was thin, and that it would not support any great weight attached to it, or that the nature and character of the ore was such that the effect of the air upon same would be to soften or slack same, causing it to disintegrate and

break away from the hanging-wall, then it is apparent that negligence might properly be attributed to the Mining Company, as such conditions should have been known to it, and necessary precautions taken to prevent the falling of the ore.

No such conditions are proven to exist in the Keane Wonder Mine. On the contrary, all the evidence in the case, including the witnesses of defendant in error, is to the effect that the ore is an extremely hard quartz, very difficult to break, and that the only way it can be removed from the hanging-wall is by the use of dynamite exploded in holes drilled from eighteen inches to twenty-four inches apart. Not only this, but it is the undisputed evidence in this case that every miner in the Keane Wonder Mine engaged in extracting the ore from the large stope shown in Exhibit "A", worked with his piston machine under ore attached to the hanging-wall,—not only the miners, but the muckers as well. All this, and no accident of a like nature prior to December 9, 1911, nor of any fact or circumstance coming to the knowledge of the Mining Company which would place it upon inquiry as to a probable danger from ore remaining on the hanging-wall. Ordinary prudence and intelligence does not compel a mine owner to guard against every possible accident or danger. It is quite sufficient that those dangers be guarded against which, considering the nature of the particular mine, are obvious or likely.

We respectfully submit that the distance between the walls, whether thirteen feet four inches, or twenty-five feet, is, in the absence of connecting evidence, wholly immaterial, and entirely insufficient to establish negligence on the part of the Mining Company.

**(3) ENORMOUS BODY LEFT ON HANGING-WALL, TO WIT:
SIXTY TONS.**

Defendant in error testified that in his judgment about seventy tons of rock and ore fell; he did not know the number of pounds or cubic feet in a ton, and that in making his estimate he was just guessing.

Louis Guerra testified that as near as he could tell or estimate, about sixty cars of rock fell (a car holding three-fourths of a ton). The evidence in behalf of defendant in error in this regard being strictly a matter of estimate, leaves the matter in doubt whether it was forty-five or seventy tons which fell. However, conceding, for the purpose of our argument, the middle ground assumed by the learned Judge of the Court below, that plaintiff in error allowed sixty tons of ore and rock to remain on the hanging-wall at the point of the cave,—how could the lower Court, and how can this Court say, as a matter of fact, that sixty tons of ore left on the hanging-wall in the Keane Wonder Mine, was, in and of itself, such a dangerous condition that the Mining Company necessarily must be charged with knowledge of possible danger therefrom, and

that, therefore, it must take such precautions as will in any event prevent same from falling?

The absurdity of such a position is demonstrated by the uncontradicted evidence in this case that in the Keane Wonder Mine the character of the ore was, and is, such that it cannot be broken except by the use of dynamite; that during the entire operations of the mine, extending over a period of four years prior to the time of the accident, the company had to, and did allow enormous quantities of ore, aggregating many hundreds of tons, to remain on the hanging-wall, and without props or supports, and without danger to any one; that this ore did not, and would not fall by reason of its own weight, and that it would only come down after same had been drilled and shot down with dynamite. And, finally, it is an uncontroverted fact that at one time Mr. Roper shot down fifteen hundred tons of ore which had for some time remained on the hanging-wall without pillar, timber or stull supporting it. It is, we submit, quite evident that the degree of care which the law imposes upon a mine owner in operating its mine, must be measured in some degree, at least, by the nature and character of the mine itself, for it would be foolish to say to the Keane Wonder Mining Company that "You must provide your mine and support your hanging-walls with the same degree of care and skill, and with the same number of stulls, as the Wildman Mine, in the State of California", which, for the Court's information, we state, on account of the nature and

character of the ground, requires so many stulls that the underground workings have more the appearance of a forest than that of a mine.

While we realize that the testimony of the witnesses for plaintiff in error as to the amount or quantity of rock or ore which fell cannot, in a consideration of this point, be considered, yet we call the Court's attention to same in order to direct the Court's attention to the absurdity of the testimony of the witnesses for defendant in error on this point.

Mr. Roper testified that not more than five or seven tons fell; Mr. Wilson, who saw the debris after a part had been removed,—two or three tons, and Mr. Williams, that in his opinion about five or six tons.

It is a well-known fact that in round numbers, about thirteen cubic feet of ore are necessary to make a ton, and that if the figures assumed by the Court are correct, the solid ore falling from the hanging-wall would, when in place, occupy a space of seven hundred and fifty cubic feet, and would constitute a solid body of ore or rock at least ten feet wide, twelve feet long, and six feet thick. This space refers, of course, to solid formation. After ore is broken and taken from its place, it will require at least eighteen cubic feet to care for a ton.

The testimony of Mr. Perez, a witness for defendant in error, was to the effect that when he reached Cunningham he found him wedged in rocks piled

up to his knee, and there is not the testimony of a single witness in the case that the height of this rock, after falling, exceeded the height of Cunningham's knee.

It is easy to gather from the foregoing the flimsy character of the evidence upon which the Court relied, and upon which the jury based its award of \$12,500. We confess that we are utterly unable to understand how any intelligent jury could base its verdict upon such evidence unless it be that plaintiff in error was a stranger in a strange land.

In concluding this branch of our argument, we especially direct the attention of Court and counsel that there is not a scintilla of evidence in the record to the effect that merely allowing sixty tons of ore or rock to remain on the hanging-wall of the Keane Wonder Mine was a dangerous thing to do. Nor is there any evidence in the case that plaintiff in error did not, so far as it was advised, leave the requisite number of pillars in order to protect the roof of that mine; nor is there any evidence in the record that plaintiff in error had any reason to believe that at the point of the cave the pillars were insufficient for the protection of the roof, or that a stull was necessary.

As we said in the beginning, the theory of the ruling of the learned Judge in the Court below is based, and can only be sustained, upon the application of the doctrine of *res ipsa loquitur*.

The following authorities are conclusive on this question in this case:

- Patton v. Texas & Pacific Railway Co., 179
U. S. 658; 45 L. ed. 361;
Mountain Copper Co. v. Van Buren, 123 Fed.
61;
Sappenfield v. R. R. Co., 91 Cal. 48; 27 Pac.
Rep. 590;
Brymer v. Southern Pacific Co., 90 Cal. 496;
6 L. R. A. (N. S.) note p. 337; 344.

In determining the liability of a mine owner on account of negligence the Court applies the same rules of law as in other cases. There is no law peculiarly applicable to mine owners.

The liability is best expressed in Thompson on Negligence, as follows:

“Mine owners are bound to exercise reasonable care and skill and to adopt all reasonable means and precautions to lessen the danger to their employes from the falling of portions of the roof of the mine; but they are not insurers, in favor of their miners, that the roof of their mine will be at all times so propped that it absolutely will not fall, either under the principles of the common law, or, it may be assumed, under the statute law.”

Thompson on Negligence, Vol. 4, p. 370, Sec. 4191.

“In order to charge the owner or operator of a coal mine with negligence because of the falling of loose rock or earth from the roof of the mine, he must have had previous knowledge of a defective or dangerous condition of the

roof, or, by the exercise of ordinary care and caution, have been able to discover the defective condition.”

Cherokee Coal Co. v. Britton, 45 Pac. 100;
 Con. Coal Co. v. Scheller, 42 Ill. App. 619;
 S. W. V. Co. v. Andrew, 86 Va. 270; 9 S. E.
 1015;

Bird v. Utica Mine, 84 Pac. 256;

Grant v. Varney, 40 Pac. 771;

Western Investment Co. v. McFarland, 166
 Fed. 76.

“The master’s liability for injuries to a servant arising from defects in the place for work, * * * is dependent upon his knowledge actual or constructive, of such defects.”

26 Cyc. 1142.

“A master is not liable for injuries resulting to a servant by reason of latent defects of which he was ignorant, and which could not be discovered in the exercise of reasonable care and diligence.”

26 Cyc. 1145, note 92.

“In order to hold a master liable for injuries to his servant alleged to have been caused by the unsafe methods of work adopted by him, it must be shown that he had, or ought to have had, knowledge of the danger.”

26 Cyc. 1156, note 35.

Applying the foregoing principles to the facts of the case at bar, it is evident, even to a layman, that the judgment against plaintiff in error is unsupported by any evidence. There is no evidence in the record that the Mining Company had

previous knowledge of a defective or dangerous condition of the roof, nor is there any evidence, direct or indirect, that by the exercise of ordinary care and caution the Mining Company would have been able to discover the defective condition (not now known) which resulted or caused the rock or ore to fall from the hanging-wall.

We submit, therefore, that the judgment of the Court below denying our motion for a directed verdict, be reversed, with instructions to the Court below to enter judgment in favor of the Mining Company.

II.

IT WAS ERROR FOR THE COURT BELOW TO ENFORCE IN THE STATE OF NEVADA A LAW OF THE STATE OF CALIFORNIA RADICALLY AND FUNDAMENTALLY DIFFERENT FROM THE LAW OF THE FORUM ON THE SAME SUBJECT.

The sum and substance of the point urged in this branch of our argument is, that the Court below applied the law of the State of California in effect at the time of the accident, and in doing so, deprived plaintiff in error of a valid and legal defense, to wit: the defense of assumption of risk. The Court's authority for so doing was the Roseberry Liability and Compensation Law of California heretofore referred to.

The Law of the State of Nevada at the time of the accident and at the time of trial, allowed and permitted the defense of assumption of risk. The

Court's rulings deprived plaintiff in error of this defense.

Had Cunningham been injured in Nevada instead of California, then, without question, this defense would have been available.

At the outset, we direct the Court's special attention to the fact that there is *no evidence in the record of reason or necessity for the commencement and maintenance of this action in the State of Nevada*. On the contrary, it affirmatively appears that the principal office and place of business of the plaintiff in error is in the State of California, and that since December 9, 1911, and at the time of trial (and at the present time), it owned, operated and conducted The Keane Wonder Mine in said State, and that it owned no other property.

In considering this subject, the Court must bear in mind that Federal Courts meet and treat questions of law arising as though they were Courts of the state of their respective jurisdictions. In other words, this Court will determine the question as though the lower Court was a Court of the State of Nevada, and in so doing, will follow the decisions of the highest Court of that state.

Note, 56 L. R. A. 197.

It is likewise elementary that the enforcement of a right given by a statute of a foreign state, in the Courts of a sister state, *is not a matter of strict right, but is a matter of comity*, and therefore defendant in error did not maintain his action in

the Court below as a matter of absolute right, even though pending in a Federal Court, and that under the principles of comity, such action will not be entertained if it would violate the public policy of the forum.

Ryan v. North Alaska Salmon Co., 153 Cal. 438; 56 L. R. A. 202;

11 Cyc. 663, Notes 70, 72, 73.

The Nevada law (Stats. 1911, p. 362) relevant to this inquiry, is an act providing for and relating solely to "*compensation*", which the act provides in lieu of damages in the usual and ordinary sense; and it is only when the employe seeks his remedy under this act to recover the "*compensation damages*" therein provided, that the employer is deprived of two most important defenses, to wit: (1) assumption of risk; (2) fellow-servant doctrine.

Defendant in error sued to recover *damages* as distinguished from the "*compensation damages*" provided for in both the Nevada and California acts. His action was not brought, nor is it maintained under the Roseberry Act—but by virtue of the general laws of the State of California. The Roseberry Act deprived the master of the defenses referred to, and as a consequence made a radical and fundamental change in the law of that state. As has been ably said:

"The change is radical, sweeping, unambiguous, and we must enforce it as written."

75 Fed. 878.

The Nevada act (Sec. 11) applies only when the *employee elects to proceed under its terms and provisions* for the recovery of compensation damages for death or accidental injury.

It is limited in its application, and deals exclusively and refers solely to the indemnity which the act provides shall be recovered by the employee *when he elects to proceed* under its terms; that this act provides and inaugurates, in reference to the subject which it relates, a radical and sweeping change in the law of the State of Nevada, is self-evident; indeed, the very act itself (Sec. 3) recognizes this fact, for it provides:

“* * * *and to each of which employments it is deemed necessary to establish a new system of compensation for accidents to workmen.*”

The Nevada act does not provide for, or in any way refer to or give to an employee, either directly or indirectly, a cause of action for the recovery of damages in the usual and ordinary sense; nor does the act deprive the employer in such actions of the two defenses so long recognized in the jurisprudence of this country, to wit: (1) assumption of risk; (2) fellow-servant doctrine.

Under the law of the forum, to wit, the law of the State of Nevada, in an action to recover damages for personal injuries, the servant is relegated to the general law on the subject, to wit:

“Whenever any person shall suffer personal injury by wrongful act, neglect or default of

another, the person causing the injury shall be liable to the person injured for damages.”

Vol. 2, Revised Laws of Nevada 1912, Sec. 5649.

Sec. 5650 provides as follows:

“That every * * * mine and mill when actually engaged in mining * * * in the State of Nevada * * * shall be liable to any of its employees * * * for all damages which may result from the negligence of the officers, agents or employees of said * * * mine * * *”

If the change in the law of the State of California is radical and sweeping, certainly it needs no argument that a like effect is produced by the enforcement of this law in Nevada, where there is no such law. If the statute law of Nevada authorizes and permits assumption of risk as a defense, and the California statute denies it as a defense, is not the difference radical and fundamental?

We submit that we have shown a fundamental difference in the laws of the two states, and have conclusively shown that the statute of the foreign state is not similar to the statute law of the forum, but fundamentally different in policy, and contrary to the public policy of the laws of the State of Nevada on the same subject.

As has been said, the enforcement of such a law in a foreign state is not a matter of absolute right, but purely a matter of comity.

We concede some contrariety in the decisions of the various states, but the great weight of authority is aptly expressed as follows:

"The decisions of this Court (well sustained by high authority) establish the doctrine that the courts of this state will not undertake to adjudicate rights which originate in another state or country under statutes materially different from the laws of this state in relation to the same subject."

O'Riley v. N. Y. Ry. Co., 16 R. I. 388; 19 Atl. Rep. 244.

Among the decisions constituting the weight of authority in this country are the following:

"Courts of justice in one state will * * * enforce the laws of another state or country when by such enforcement they will not violate their own laws or inflict injury upon their own citizens."

Roblin v. Long, 60 How. Pr. 200.

"Statutes must be similar to those of the foreign state under which the action arose."

St. Louis Ry. v. Brown, 62 Ark. 254; 35 S. W. 225.

"There must be no fundamental difference of policy."

Walsh v. N. Y. Ry. Co., 160 Mass 571; 36 N. E. 584; 39 A. S. R. 514.

"Must not be in contravention of the public policy of the laws of the state."

Delahye v. Heitkemper, 16 Neb. 475; 20 N. W. 385.

“Courts of justice in one state will out of comity assume jurisdiction of causes of action which are transitory in their nature, given by and arising under the statutes of a foreign state, where by so doing they will not violate their own laws.”

11 Cyc. 663, note 70.

In determining whether jurisdiction shall be retained and a right given by statute of a foreign state enforced as a matter of comity, courts are guided by well-settled legal principles, one of which being quite sufficient to demonstrate the error of the Court below in denying our motion to dismiss, and is well expressed in the following language:

“When, however, the cause of action depends upon a statute, the majority of the courts (including the Supreme Court of the State of Nevada) favor the position that there must be a statute in the forum similar to that of the place where the cause of action arose.”

56 L. R. A. 203;

Texas Ry. v. Cox, 145 U. S. 593;

Burns v. Grand Rapids Ry. Co., 113 Ind. 169;

15 N. E. 230;

Leonard v. Columbian Steam Nav. Co., 84

N. Y. 48; 36 A. R. 481;

Texas Ry. Co. v. Richards, 68 Tex. 375; 4

S. W. 627;

Mexican Ry. v. Jackson, 89 Tex. 107; 31 L.

R. A. 276; 33 S. W. 857.

“Some of the courts allude to the similarity of the statutes as merely showing that the en-

forcement of the action in the forum is not against its public policy.”

56 L. R. A. 203;

Shedd v. Moran, 10 Ill. App. 618;

Chicago Ry. v. Doyle, 60 Miss. 977;

Lower v. Segal, 59 N. J. L. 66; 34 Atl. 945;

Knight v. West Jersey Ry. Co., 108 Pa. St. 250; 56 A. R. 200

“A few of the cases, however, may be regarded as authority against the necessity of a similar statute in the forum.”

56 L. R. A. 204;

Herrick v. Minnesota Ry., 31 Minn. 11; 16 N. W. 413;

Chicago Ry. v. Rouse, 178 Ill. 132;

S. C. Ry. Co. v. Thurman, 106 Ga. 804; 32 S. E. 863;

McLeod v. Conn. Ry., 58 Vt. 727; 6 Atl. 648.

Upon the whole, however, the weight of authority insists that there shall be a statute of the forum similar to that of the place where the cause of action arose.

56 L. R. A. 204.

The following authorities may be referred to in which the statute law of a foreign state was not enforced because different from the law of the forum:

St. Louis Ry. v. McCormick, 71 Tex. 660; 1

L. R. A. 804; 9 S. W. 540;

Bet v. Gulf Ry., 4 Tex. Civ. App. 231; 22 S. W. 1062;

Texas Ry. v. Richards, 68 Tex. 375; 4 S. W. 627;

Patton v. Pittsburgh Ry., 96 Pa. 169;

Mexican National Ry. v. Jackson, 89 Tex. 107; 31 L. R. A. 276; 33 S. W. 857;

Ash v. Baltimore Ry., 72 Md. 144; 19 Atl. 643;

Dale v. Atchison Ry., 57 Kan. 601; 47 Pac. 521;

Matheson v. Kan. City Ry., 61 Kan. 667; 60 Pac. 747.

The Supreme Court of the State of California recognizes the doctrine announced by the great weight of authority.

“Where the action, as here, is transitory in its nature, a right or liability imposed by the statute of another state or of the United States *may in proper cases be asserted and enforced in this state.*”

Ryan v. North Alaska Salmon Co., 153 Cal. 438.

As hereinabove intimated, the decisions of the Supreme Court of the State of Nevada are in full accord with the weight of authority. In a recent and very ably considered opinion, Judge Norcross held:

“Courts will enforce a cause of action for death by wrongful act growing out of the laws of another state when not contrary to the public policy of the state of the forum. The public policy of a state in respect to enforcing the remedy in an action for death by wrongful act

only goes to the extent that it by legislation has changed the common law, and unless the *lex fori* is substantially the same as the *lex loci*, the latter law will not be deemed consistent with the public policy of the forum."

Christensen v. Floriston Pulp and Paper Co.,
29 Nev. 552; 92 Pac. 210.

The decisions of the highest courts of the two states being in accord with the weight of authority, it inevitably follows that the lower Court erred in retaining jurisdiction of the case after objection made, for the reason that the enforcement of the California statute gave to defendant in error a legal right not granted him by the statute of the State of Nevada.

It is respectfully submitted that the judgment should be reversed, with instructions to the Court below to enter judgment in favor of Keane Wonder Mining Company.

Dated, San Francisco,
January 27, 1915.

GAVIN McNAB,
SWEENEY & MOREHOUSE,
B. M. AIKINS,
A. H. JARMAN,
Attorneys for Plaintiff in Error.

2495

No. 2425

IN THE

United States Circuit Court of Appeals³

For the Ninth Circuit

KEANE WONDER MINING COMPANY

(a corporation),

Plaintiff in Error,

vs.

JAMES CUNNINGHAM,

Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR

DIXON & MILLER,

J. B. DIXON,

A. GRANT MILLER,

Counsel and Attorneys for

Defendant in Error.

Filed

Filed this FEB. 18, 1915 day of February, 1915.

F. D. Monckton FRANK D. MONCKTON, Clerk.

Clerk.

By Deputy Clerk.

No. 2425

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BRIEF FOR DEFENDANT IN ERROR.

Defendant in Error will first present a view of the evidence.

The ore bodies in the Keane Wonder Mine consisted of what is known as a flat or blanket vein. The ore body in the big stope, some six hundred feet in circumference, where plaintiff was injured, was a flat or blanket vein but irregular, it was not perfectly flat but had a slight pitch and was slightly waving as to foot and hanging walls. The distance between the foot wall and the hanging wall varied throughout the stope. A portion of the stope had been worked out long prior to the 9th of December,

1911, a portion of the stope was supported by stulls, other portions were supported by pillars of ore left varying in size and shape. In the older portions of the stope where pillars had been left, these pillars were reduced in size by mining of a part of the pillar from time to time. The ore body varying in thickness up to fifteen feet or more contained a flat seam running through it at about six or seven feet above the foot wall. The ore below the flat seam was broken out by means of the Piston drills, working straight ahead. The ore above the seam referred to was mined by means of the Waugh drills which were used to break down the upper part of the ore vein from the hanging wall. The hanging wall consisted of graphitic schist. Between the hanging wall and the ore body, lying upon the hanging wall, was a seam of soft material commonly known as gouge. After the lower part of the vein, the ore body resting upon the foot wall up to the before-mentioned seam in the ore body, at a distance of six or seven feet above the foot wall was mined by means of the Piston machines, the upper part of the ore body, several feet in thickness, was comparatively safe to work under for the reason that it was solid, but after the Waugh machines had been used and the upper part of the ore body in the vein blasted, the situation became entirely different. The blasting would naturally and inevitably disturb and loosen the before-mentioned seam of gouge and if any of the ore in the upper part of the seam failed to come down by reason of the blasting following the work of the Waugh

drills it would be dangerous for men to work under it unsupported. Proper mining would indicate that all of the ore upon the hanging wall should be broken down and proper regard for the safety of the miners and muckers would demand either that such ore left so hanging should be broken down or supported by stulls. There would be no element of safety to the men working under such a body of ore left hanging upon the hanging wall, attached to the seam or gouge, after the use of the Waugh drills, in the leaving of pillars of ore, unmined, at any point in the stope no pillars could have any effect in preventing the fall of such ore left hanging, but the only effect of such pillars would be to prevent the hanging wall itself coming down. At the point where Cunningham was hurt a body of ore, on the upper part of the vein, had been left on the hanging wall over his head with the before-mentioned seam of gouge between it and the true hanging wall. The pillar system would operate to prevent the caving of the hanging wall itself, but was wholly independent of and useless as a means of protection to the miner against the falling of such bodies of ore left upon the hanging walls at intermediate points. There would be but two ways to protect the miners in such a situation. (a) Break down the ore so left. (b) Support by stulls. The Keane Wonder Mining Company did neither. The condition which resulted in the injury of Cunningham was and must have been well known to the mining Company, its Superintendent and officials. The presence of the seam of gouge, being soft mater-

ial, a sort of mud, was of itself a great factor of danger. It must further be remembered that there were three drilling machines working in the stope and that numerous blasts followed the work of each machine. These blasts would unquestionably have a tendency to shake and render loose any ore left upon the hanging wall after the Waugh machines had been used at such a point. The complaint squarely charges that the Mining Company was negligent in leaving that mass of ore upon the hanging wall without timbers or support of any kind. It is the crux of the case, the Mining Company officials knew the ore was there. They set the plaintiff Cunningham to work under it, together with Porter. The duty of Cunningham was to shovel broken ore lying upon the foot wall into a car, and tram it to the chute. The last work done upon the upper part of the ore body at the point where the body of ore was so left hanging to the hanging wall had been done four days previous to the 9th day of December, 1911. Cunningham had no duty except as aforesaid. He was working as a mucker only and as the witness Dropulich testified "A mucker's duty is just to muck." Under specific directions of the boss Cunningham did some other work, to wit, helped to put in the switch track, but no instructions were given him as to making the place safe and no warning was given him as to any danger at the point where he was hurt, or for that matter any other place. Now, the question of negligence hinges upon that situation. Was the defendant Company negligent in so

leaving a mass of ore upon the hanging wall with a seam of gouge between, unsupported by anything whatever at the place where Cunningham was hurt, and setting him there to work without any warning as to any element of danger thereat?

On the trial Cunningham introduced a map marked "Plffs. Ex. No. 1", this map was used during the testimony of Cunningham and of his several witnesses who all regarded it as an accurate map. The Mining Company introduced three maps marked as "Deft's. Ex. A, B and C". The accuracy of these maps is testified to by Homer Wilson, the president and manager of the Mining Company (see record pages 143 to 153). The original maps have not been brought up with the record and there are bound in at the end of the record what purport to be reduced photographic copies of these maps but there is nothing whatever in the case of map "A" to show what is the scale of the map in its present form. The original map as used on the trial is 63 inches long and 34 inches wide, but map "A" in the record is 25½ inches long and 14 inches wide. This map shows the scale to be one inch to 50 feet, and to the right the figure 20'. This was intended no doubt as the scale of the large map used on the trial but it is certainly not accurate as to the map contained in the record. The Mining Company's map "B" as contained in the record shows a number of squares measuring 100 feet each way, so that measuring on this map the present scale appears to be 100 feet to ¾ of an inch; and it is noted in passing that the thickness of the

ore body on this map scales from 20 to 30 feet or in other words the distance between the foot and the hanging-wall in the mine. There is nothing on map "A" to show what is the present scale from which distances may be compared with the evidence of the witnesses; but it seems fair to assume that the photographer in making a reduced copy or photograph of this map made the same proportionate reduction as in map "B". By measuring sizes and distances in accordance with this scale it will readily appear that the distances as given by the several witnesses for the Mining Company do not at all correspond with measurements made on the map.

Cunningham and practically all of his witnesses considered map "A" as incorrect and this will readily appear from the examination of their testimony as appearing on pages 72, 73, 83, 86 and 98. It also appears from the evidence of Roper (record pages 177, 178, 212, 213, 214 and 215) that he, himself, did not consider the map accurate in certain particulars. It also appeared from the cross-examination of the witness Wilson (record page 159) that the map was not a full or complete one.

It is believed that measurements taken from map "A" will show that the evidence of Cunningham and his witnesses correspond more nearly with this map than the evidence of Wilson, Roper and other witnesses for the Mining Company.

Cunningham's testimony as to the position where the ore fell from the roof will be found on pages 58, 59, 74 and 83. Guerra's testimony on the same point

appears on 107, and the testimony of Perez on pages 109 and 112, and of Frank Porter on page 123; while Wilson's testimony appears on pages 152, 157 and 168 and the testimony of Roper on pages 177, 189, 190, 194, 198, 208, 224, 225 and 227.

Cunningham testified that the quantity of ore and rock that fell from the roof, causing his injuries, was in his estimation about 70 tons (record pages 60, 74, 84 and 86). He also testified as to the suddenness of the fall on pages 78 and 82. Lewis Guerra also testified on the same subject (record pages 106 and 107), and Perez on pages 109 and 114, and Porter on pages 121 and 122. See also testimony of Matt Dropulich, pages 93 and 96.

It is true that some of the witnesses for the Mining Company testified that the quantity of ore that fell from the roof was much smaller in amount than shown by the testimony of Cunningham, but this testimony was all elicited after the trial Judge had denied the Mining Company's motion for a non-suit and directed verdict, and at that time the testimony of Cunningham and his witnesses was alone before the court. The verdict of the jury, however, shows or indicates that the jurors believed the testimony of Cunningham to a greater extent than they believed the testimony on behalf of the Mining Company.

The testimony of Cunningham as to the want of support of the roof of the mine appears in the transcript on pages 61, 69, 70, 71, 75, 84, 86 and 87, and the testimony of other witnesses on Cunningham's be-

half, on pages 94, 96, 106, 107, 110, 111, 112, 122 and 123.

The testimony by and on behalf of Cunningham with reference to instructions or directions of the mine foreman will be found in the record on pages 62, 68, 69, 70 77, 80, 81, 82, 94, and 106. It is true that Roper testified for the Mining Company much to the contrary on pages 176 and 206 of the record, but in this respect he is contradicted by several of the witnesses for Cunningham.

It was testified by Cunningham and others of his witnesses that it was not the duty of the muckers but of the miners or machine men or the mine foreman to examine and pick or bar down all loose or dangerous ore or rock on the roof, this appears in the record on pages 62, 78, 80, 81, 82, 94, 95, 106, 116, and 124. It appears, however, that Wilson on pages 164, 174 and Roper on pages 184, 194, 195, 196, 198, 221, 222, 224 do not agree with Cunningham's witnesses, although Roper admitted and showed by his actions that he considered it as a part of his duty to examine the roof and pick down or bar down or if necessary drill and shoot down all ore left on the hanging-wall of the mine. The jury had good reason to believe and apparently did find that the Mining Company owed a duty to Cunningham and other employees to either pick down, bar down or shoot down the ore remaining on the hanging-wall and that the Mining Company and its foreman or other employees did not perform this duty or render the place safe where Cunningham was at work and

injured by the falling of the large mass of ore from the roof. The jury also, practically, found that the Mining Company by Roper, its foreman, had notice and knowledge of the dangerous condition of this ore body hanging from the roof of the mine.

It appeared from the evidence of Homer Wilson (record page 163) that there was a gouge or seam of soft material varying "from the thickness of your hand to 18 inches", and that this fact was known to the Company for it was testified to by the president of the Company. Reference is also made to the testimony of Roper on pages 184, 186, 221, 224. It appears on page 186 that he "drilled a series of holes all the way around which I can show you on the map there—the block of ground; I drilled a series of holes all the way around it and after the men went away I went and loaded the holes and blew that thing myself, and that all came down, a little over 1,500 tons, at one time, that all came down". He also testified that this was in a space without pillars, as large as the court room. It is submitted that if by firing a set of holes surrounding so large a body of ore, the whole body would fall from the roof, that there must have been a well defined gouge of soft material or else so large a body would not have fallen from the roof unless numerous other holes had been drilled all over this ore body; and the Mining Company must necessarily have had full knowledge and notice of the danger of leaving a small or large body of ore hanging from the roof without being either blasted or barred down.

We have already pointed out that there was a very considerable discrepancy in the evidence by and on behalf of Cunningham and for the Mining Company as to the number, position and distance apart of the pillars in the mine; but on the number and position of the stulls or timbers placed in the mine to support the roof, the witness Roper disagrees with Cunningham and all of his witnesses and disagrees also with Wilson and with map "A" prepared by Wilson. Roper swears that he placed, before the injuries received by Cunningham, a row of stulls along the car track close to where Cunningham was injured. If such stulls had been there at such time it is absolutely certain that the map prepared by Wilson by actual measurements and observation on the ground would have shown the stulls; but they are not shown on map "A", nor did Wilson testify to them, and Cunningham and all of his witnesses testified that there were no such stulls placed there. It is not therefore to be wondered at that the jury did not place much reliance upon these statements made by Roper.

Roper in another part of his testimony stated that the body of ore which fell from the roof was attached to one of the pillars and fell directly down from the roof, that this was the pillar shown in the map as N. P. (record pages 189 and 190). Roper testified, pages 190 and 208, that Cunningham was against this pillar N. P. and Porter was against the pillar 23 at the time both were injured by the fall of ore from the roof. Notwithstanding this testimony he testi-

fied at the foot of page 227 that if this lump of rock had struck a man, who was directly beneath, it would have "broken every bone in his body". According to his previous testimony Cunningham was standing against this pillar and directly under the ore body.

The position of Cunningham at the time he received his injuries is shown in the record on pages 58, 59, 60, 63, 78, 83, 85, 87, 107, 112, 113, 114; while Wilson (record page 168) disagreed with Cunningham's testimony only in placing him a little closer to the pillar, within 10 to 12 feet; but the jury evidently accepted Cunningham's version of the position he occupied.

The position of Porter at the time of the cave is shown in the record on pages 63, 78, 84, 112, 121, while Wilson places him in approximately the same position; but Roper places him against a different pillar, 23 instead of against the pillar N. P. where he is placed by all of the other witnesses.

The positions of stulls or timbering are referred to on pages 69, 70, 71, 83, 87, 94, 106, 110, 122 and 123. Little or nothing was testified to by Wilson as to the position or number of stulls, and we have already shown as to the position of the stulls that Roper contradicts all other witnesses on that subject.

As to the duty to examine the roof and pick or bar down the loose ore or rock, see pages 77, 80, 81, 221, 222, 224 of the record.

Cunningham testified (record pages 77 and 78) that the body of the ore had been left hanging from

the roof some four days before he received his injuries, while Roper testified (pages 197 and 201) that the ore had been hanging therefrom about two months. Testimony as to previous falls of ore and rock from the roof and of knowledge of the Mining Company will be found on pages 156, 166, 183, 194, 195, 197, 220, 221 and 224 of the record.

The counsel for the Plaintiff in Error contended that the trial judge ought to have granted their motion for a non-suit or directed verdict, on two grounds: First, because there was not sufficient evidence of negligence by the Mining Company to be submitted to the jury, and second, on the ground that the Federal Court in Nevada ought not to take jurisdiction in this case because of difference in the laws of California and Nevada. We will treat this second ground toward the end of this brief.

The learned and careful trial judge in his decision contained on pages 139, 140 and 141 of the record shows clearly (and we have pointed out the evidence justifying his conclusions), that, in addition to the fact that the ore body did actually fall upon Cunningham, the leaving a large body of ore on the hanging-wall was a fact tending to show negligence, and the other attending facts and circumstances were sufficient to justify the refusal of the trial judge to direct a verdict for the Mining Company or to non-suit Cunningham.

If the Mining Company had desired to secure the benefit of any lack of evidence produced by Cunningham up to the time of the making of this motion, it

ought to have rested and introduced no evidence on its part to controvert the evidence on behalf of Cunningham. It proceeded instead to introduce evidence on its own behalf and Cunningham was entitled to the benefit of any evidence favorable to him introduced by the Mining Company in its defense; and it is undoubtedly true that the witnesses, Wilson and Roper did produce much testimony which absolutely had the tendency to show negligence on the part of the Mining Company and, even if the trial judge had erroneously refused a non-suit, this evidence produced by the Mining Company was certainly sufficient to entitle Cunningham to have the jury pass upon all the evidence produced before it.

In this connection we cite the case of the Reno Brewing Company vs. Packard, 31 Nev. 433, 441, 442 and 443 and the authorities there cited. It is submitted that this court ought to follow in this respect the decision of the Supreme Court of the State of Nevada.

Nevada Revised Laws, section 5651 provides that "all questions of negligence and contributory negligence shall be for the jury". It is submitted that this affects the procedure on the trial of this action and that this Nevada Statute was and is binding on the United States District Court as well as upon this Court.

Counsel for the Plaintiff in Error in their brief on pages 59, 60, 61 and 62 make citations from 26 Cyc. While, for the most part, these citations have no real application to the facts and circumstances of the

case at bar, a fuller examination of the whole article in 26 Cyc. will show that it will not aid the Plaintiff in Error or in any way prove its contentions.

We now make a few citations from 26 Cyc. which have been omitted in the said brief. On pages 1102, 1103, 1104 it is said "Nevertheless the degree of care which the law requires of the master is greater than that which is required of the servant, and the master may be chargeable with negligence in failing to ascertain the danger where the servant is not". On page 1106: "It is actionable negligence on the part of a master to fail to furnish his servant with such tools and appliances as may be required for the reasonably safe prosecution of his work". This is applicable to the failure of the mining company to furnish Cunningham with any bar for the purpose of testing the roof of the stope in which he was working.

On page 1136 of 26 Cyc. it is said "It is not only the duty of the master to use ordinary care to furnish his servant with a reasonably safe place to work, and with reasonably safe machinery and appliances, but he must also, by inspection from time to time, and by the use of ordinary care and diligence, in making repairs, keep them in a reasonably safe condition". On page 1142 it is said "If he knew or should have known by the exercise of reasonable care and diligence, of their existence, he is liable; negligent ignorance is equivalent to knowledge". Again on pages 1411, 1412 it is said "The maxim "*res ipsa loquitur*" is applicable only where the

matter of the occurrence or the attendant circumstances are such that the jury can reasonably infer that the occurrence would not have taken place unless the master was lacking in diligence". Again on page 1443 "such causal connection need not, however, be shown by direct evidence, but it is sufficient if it is reasonably indicated by the circumstances". Again on pages 1444, 1445 and 1446 it is said "There must be a preponderance in favor of plaintiff, but this may arise either circumstantially or directly; and *in any event the question should be submitted to the jury where there is any evidence whatever, which has a tendency to show the negligence alleged*" (see numerous cases cited in note 86.) Again on pages 1451 and 1452 it is said "Just what evidence will be sufficient necessarily depends upon the facts of the particular case, and *should be left to the jury.*"

The cases cited on pages 59, 60, 61, 62, 80 and 81 of the brief of the Plaintiff in Error are chiefly with the object of establishing that the doctrine "*res ipsa loquitur*" applies to the facts of the case at bar, and in the cases cited or at least in most of them there was no proof made of anything beyond the actual happening of the event which caused the injuries or the death. In *Patton vs. Texas & P. R. Co.*, from which the opposing counsel have cited at length, 179 U. S. 658, 45 L. ed. 361 we would make some short additional citations; "He has the same opportunity that jurors have for seeing the witnesses, for noting all those matters in a trial not capable of record, and

when in his deliberate opinion there is no excuse for a verdict save in favor of one party, and he so rules by instructions to that effect, an appellate court will pay large respect to his judgment". "Tested by these rules we do not feel justified in disturbing the judgment, approved as it was by the trial judge and the several judges of the circuit court of appeals. Admittedly, the step, the rod, the nut, were suitable and in good condition. Admittedly, the inspectors at El Paso and Toyah were competent. Admittedly, when the engine started on its trip from El Paso the step was securely fastened, the plaintiff himself being a witness there. The engineer used it in safety up to the time of the engine's return to El Paso. The plaintiff was not there called upon to have anything to do with the engine until after it had been inspected and repaired. He chose, for his own convenience, to go upon the engine and do his work prior to such inspection."

In this case the trial judge directed a verdict for the defendant and it was largely so decided because the trial judge had heard and observed the demeanor of the witnesses and it was chiefly for this reason that his decision was sustained. The facts and circumstances of that case bear no resemblance to the facts and circumstances of the case at bar; but applying the same rules as to the hearing of the witnesses and observing their demeanor the decision of Judge Farrington ought to be sustained.

Western Investment Company vs. McPharlan, 166 Fed. 76, cited on page 81 of the mining company's

brief, is an authority which supports the decision of Judge Farrington. The decision on page 79 says: "Is there any substantial evidence tending to show that the rock fell as a result of the defendant's negligence? If so the case was properly submitted to the jury and its verdict is conclusive of that fact. The usual way of guarding against the fall of rock in mining stopes is to brace the walls against each other by timberings or stulls as the stope progresses forward." *Texas R.R. v. Cox, 145 U.S. 593*

At the beginning of section 1600, in Labatt's Master and Servant (2nd. Ed.), it is stated, "The doctrine which has very frequently been affirmed in employer's liability cases is that the mere fact of a servant's having been injured owing to the existence of abnormally unsafe conditions, is not of itself sufficient to overcome the presumption entertained by the law, that the master has exercised proper care". The last paragraph of this same section (p. 4864) is as follows: "The doctrine discussed in this section is applicable only in cases where the servant produces no other evidence of negligence than the mere fact of the accident. If specific testimony bearing on that question is submitted, he is entitled to go to the jury."

This last quotation is applicable strictly to the case at bar, where there was considerable specific testimony bearing on the facts and circumstances, besides the mere fall of the rock upon Cunningham.

While the first of the above citations from Labatt is supported by many authorities there is, particu-

larly of late years, much conflict on that point and the tendency of the courts of recent years is very strongly towards giving greater weight to the doctrine of "*res ipsa loquitur*" and of extending its application to many classes of cases to which the earlier authorities held it not applicable.

In addition to this conflict of authority which has arisen chiefly in recent years, there are many well established qualifications of the doctrine, and many exceptions have been established by the courts and it may be said that these qualifications and exceptions are at least as firmly established as the original doctrine itself and we submit that the authorities supporting these qualifications and exceptions are now much more numerous than authorities supporting the original rule.

Lebatt (vol. 4) in sections 1601 and the foot notes on pages 4865, 4866, 4869, 4870, 4871, 4872, 4873, 4874, 4875, 4876, 4877, 4878, 4879, 4886, 4887, 4888, 4889, 4890, 4892, 4893, 4894, 4900, 4901, 4902, 4903, 4904, 4905, 4906, 4907, 4911, 4912, 4913, 4914, 4915, 4916, 4917, 4918, 4919, has cited many authorities, some of which are digested.

It is submitted that an examination of these authorities will show that the trial judge committed no error in refusing to direct a verdict for the mining company or in refusing to grant the mining company's motion for a non-suit on the ground of insufficiency of evidence to sustain the judgment.

The Plaintiff in Error on page 83 of its brief complains that this action was brought in the State of

Nevada instead of the State of California. It has been so long and clearly settled that, whenever, by either the common law or the statute law of a state, a right of action has become fixed and a legal liability incurred, that liability may be enforced and the right of action pursued in any court which has jurisdiction of such matters and can obtain jurisdiction of the parties, it seems needless to cite any authorities in support of this doctrine. We cite the cases of *Dennick vs. Central R. R. Co.*, 103 U. S., 11, 26 L. ed. 439; *Christensen vs. Floriston Paper Company*, 29 Nev., 552, 560 and 562.

In the case at bar the action was commenced in the Nevada State Court and the Plaintiff in Error entered a voluntary appearance and by petition caused the action to be removed to the Federal Court, so that there is no question whatever of the jurisdiction of the Court in the present case.

The case of *Dennick vs. Central R. R. Company* is looked upon as the leading case as to the right of parties to bring actions in one state where the injuries complained of were suffered in another state in which the law on the subject was different from the law of the forum. This case was approved of and followed in the case of *Texas R. R. vs. Cox*, 145 U. S. 593. These two cases settle the law on the subject so far as the Federal Courts are concerned, and it requires only a very slight examination of the authorities to show that the United States Courts have approached the subject in a more broad-minded and liberal way than the courts of many states.

It is claimed, however, on behalf of the Plaintiff in Error that the Nevada case of Christensen vs. Floriston Paper Company, 29 Nev. 522, furnishes an authority which this court is bound to follow and that it supports the doctrines established by some of the state courts, which is much narrower than the doctrines established in the Dennick case. It will be observed, however, that on pages 560, 561, 562, 563 and 564, the Nevada Supreme Court cited and quoted from the Dennick and other cases with approval and, in effect, followed them. The most that can be said by the Plaintiff in Error of this case is that the statutes of the state where the injuries were sustained must not be in conflict with the public policy of the State of Nevada. In the Christensen case, under the California Statute, the action was transitory, while under the Nevada Statute it was not transitory but local, this discloses a very much greater difference in the laws of the two states at that time than those existing at the time Cunningham sustained his injuries and also at the time the case was brought to trial in the District Court.

At the time Cunningham sustained his injuries the Roseberry Law was in force in California and there was in force in Nevada a compensation law which contained the following language:

“Provided, that recovery hereunder shall not be barred where such employee may have been guilty of contributory negligence where such contributory negligence is slight and that of the employer is gross in comparison, but in which event the compensation may be diminished in proportion to the amount of negligence attributable

to such employee, and it shall be conclusively presumed that such employee was not guilty of contributory negligence in any case where the violation of any statute enacted for the safety of employees contributed to such employee's injury; and it shall not be a defense: (1) That the employee either expressly or impliedly assumed the risk of the hazard complained of; (2) That the injury or death was caused in whole or in part by the want of ordinary or reasonable care of a fellow-servant. No contract, rule or regulation shall exempt the employer from any of the provisions of the preceding section of this act."

At the time of the trial of the action in the District Court there was in force in Nevada a compensation law which contained the following provisions:

"(c) If an employer having the right under the provisions of this act to elect to reject the terms, conditions and provisions thereof and in such case exercises the right in the manner and form by this act provided, such employer shall not escape liability for personal injury sustained by an employee of such employer when the injury sustained arises out of and in the usual course of the employment because:

"(1) The employee assumed the risks inherent to or incidental to or arising out of his or her employment; or the risks arising from the failure of the employer to provide and maintain a reasonably safe place to work, or the risks arising from the failure of the employer to furnish reasonably safe tools or appliances, or because the employer exercised reasonable care in selecting reasonably competent employees in the business:

"(2) That the injury was caused by the negligence of a co-employee:

"(3) That the employee was negligent, unless and except it shall appear that such negligence

was wilful and with intent to cause the injury; or the result of intoxication on the part of the injured party:

“(4) In actions by an employee against an employer for personal injuries sustained arising out of and in the course of the employment where the employer has elected to reject the provisions of this act, it shall be presumed that the injury to the employee was the first result and growing out of the negligence of the employer; and that such negligence was the proximate cause of the injury; and in such case the burden of proof shall rest upon the employer to rebut the presumption of negligence.”

It is therefore submitted that the provisions of the California law did not conflict with the public policy of the State of Nevada as expressed in both of these statutes from which quotations are made.

On page 84 of the brief for the Plaintiff in Error a quotation is made from the case of the Illinois Central R. R. Company vs. Ihlenberg, 75 Fed. 873, the quotation being taken from page 878 as follows: “Section 193 of the present constitution practically destroys the defense in cases where no wilful or reckless negligence can be predicated of the conduct of the injured and complaining employee. The change is radical, sweeping, unambiguous, and we must enforce it as written”. Notwithstanding these phrases used by the court, it is held on page 879 that the Federal Court in Tennessee ought to enforce this radical change made in the Mississippi Statute with reference to torts committed in that state, and many authorities are cited in support of the position taken by the court. In the case of O’Riley vs. N. Y. R. R.

Co., 16 R. I. 388, 19 Atl. 244 cited on page 87 of the brief for the Plaintiff in Error, the court refused to follow the Massachusetts Statute on the ground that this was a penal statute which would not be enforced in a foreign jurisdiction. The Massachusetts Statute provided that the R. R. Co. killing a passenger under certain conditions was subject to a fine of \$5,000,—but further provided that the fine should be paid to the proper heirs or relatives of the deceased.

In the case of *Welch vs. N. Y. R. R. Co.*, 160 Mass. 571, Holmes' J. (now on the U. S. Supreme Court Bench) says: "If by the law of another state where a personal injury is suffered and recovery may be had there, an action may be maintained for the injury in this commonwealth, although the plaintiff could not have recovered therefor if the injury had happened here"; and he cites *Higgins vs. Central N. E. R. R.*, 155 Mass. 176 and Story's conflict of Laws (8 ed. section 825) which gives the true doctrine as, "whether the domestic law provides for redress in like cases should in principle be immaterial, so long as the right is reasonable and not opposed to the interests of the state." And citing the *Dennick* case and *Leonard vs. Columbia Steam Navigation Company*, 84 N. Y. 48.

In *St. Louis R. R. vs. Brown*, 62 Ark. 254, 260, 261 it is said "The common law rule is that where the right of action is transitory in its nature courts everywhere, when the defendant may be lawfully summoned to appear therein, for jurisdiction; and when the suit is governed by the statutes of the state

in which the injury is committed, courts of another state having similar laws or where it is not contrary to its public policy, will enforce such laws by the rule of comity. *Texas and Pac. R. R. vs. Cox*, 145 U. S. 593; *Eureka Springs R. R. Company vs. Timmons*, 51 Ark. 459; *Boyce vs. R. R. Company*, 63 Iowa 70; *Morris vs. R. I. & Pac. R. Co.*, 65 Iowa 727; *Herrick vs. M. & St. L. R. Co.*, 31 Minn. 11; *Wintuska vs. L. & N. R. R. Co.*, 20 S. W. 819.

In *Chicago St. L. & N. O. R. R. Co. vs. Doyle*, 60 Mississippi, Campbell, C. J. says: "The right of action for damages for killing a husband given by the statute of Tennessee may be asserted in the courts of this state, because of the co-incidence of the statutes on this point, and independently of this, because the right of action created by the statute of another state, of a transitory nature, may be enforced here, when it does not conflict with the public policy of this state and permit its enforcement", citing the *Dennick* case and *Nashville etc. Ry. Company vs. Sprayberry*, 8 Baxter 341; *Selma etc. R. R. vs. Lacey*, 49 Geo. 106; *Leonard vs. Columbia etc. Company*, 84 N. Y. 48; in *Dellahaye vs. Heitkemper*, 16 Neb. 475, 477, 478; the law is stated to be "while it is true that the statute of another state has no extra territorial effect, yet rights acquired under it will always be enforced, if not against the public policy of the state where the action is brought—in other words courts enforce rights, no matter where they were acquired, if not in contravention of the laws of the forum. In all such cases the law of

the place where the right was acquired controls as to the right of action," citing several cases.

In the cases cited at the foot of page 89 and the first half of page 90 of the brief for the Plaintiff in Error, the actions were brought to recover damages resulting from death and in all of those cases it will appear that there were great, and in some cases, very perplexing differences in the statutes of the different states under consideration and related chiefly to the necessary parties to the actions, beneficiaries and the distribution of the estates and in the procedure.

In the case of *Belt vs. G. C. & S. F. R. R. Co.*, 4 Texas Civ. App. 231, it was held that the laws of Texas and of Louisiana were so dissimilar that the Texas Court ought not to assume or hold jurisdiction of the action; but in *Texas & Pac. R. R. Co. vs. Cox*, 145 U. S. 593, 604, 605 and 606 the court held that the same statutes were not so unlike that the Federal Court in Texas should not take and hold jurisdiction where the injuries were sustained in Louisiana. In this case the *Dennick* case was referred to as settling the law that, "A right arising under or a liability imposed by either the common law or the statute of the state may, where the action is transitory, be asserted and enforced in any court having jurisdiction of such matters and of the parties."

Dale vs. R. R. Co., 57 Kans. 601, and *Matherson vs. Kansas C. F. S. & M. R. R. Co.*, 61 Kans. 677, held that the New Mexico statute in one case and the

Missouri statute in the other case were penal in character and for that reason Kansas courts ought not to take jurisdiction.

It is therefore respectfully submitted that no substantial or reversable error appears in the record.

Dated February 17, 1915.

DIXON & MILLER
J. B. DIXON,
A. GRANT MILLER.

Counsel and Attorneys
for Defendant in Error.

No. 2495

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

KEANE WONDER MINING COMPANY
(a corporation),

Plaintiff in Error,

VS.

JAMES CUNNINGHAM,

Defendant in Error.

PETITION FOR A REHEARING ON BEHALF OF PLAINTIFF IN ERROR.

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Filed this..... day of June, 1915.

JUN 2 - 1915

FRANK D. MONCKTON, Clerk.

By F. D. Monckton, Deputy Clerk.
Clerk,

No. 2495

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PETITION FOR A REHEARING ON BEHALF OF PLAINTIFF IN ERROR.

*To the Honorable William B. Gilbert, Presiding
Judge, and the Associate Judges of the United
States Circuit Court of Appeals, for the Ninth
Circuit:*

The plaintiff in error, Keane Wonder Mining Company, respectfully asks a rehearing in this case that further consideration may be given to facts which are misconceived in the opinion, and consequent erroneous conclusions based thereon.

We respectfully submit that the Court has erred in stating the facts in its opinion, and that therefore

the reasoning, deductions and conclusions based thereon are unfair, and unjust to petitioner.

The Court will remember that Cunningham recovered judgment in the sum of twelve thousand, five hundred dollars (\$12,500) for injuries (to wit, a broken leg) sustained while in the employ of the Mining Company in what is known as the "Keane Wonder Mine". *It was claimed that the injury was caused by the falling of loose rock which the Mining Company carelessly and negligently allowed to remain on the roof or top of a stope in which Cunningham was at work.*

The three elements of negligence charged in the amended complaint may be fairly summed up as follows:

(1) *In not properly timbering said stope.*

(2) *In not properly examining and inspecting same.*

(3) *In not properly picking or barring down the loose rock at the roof or top of said stope.*

These three items include all the negligence charged against the Mining Company. With issues framed upon these allegations the company was forced to trial. *The case was tried upon the theory thus developed.* The Mining Company prepared its defense accordingly. We submit, therefore, that *if the judgment in favor of Cunningham can not be sustained upon the evidence introduced under the pleadings, it ought not to be sustained by this*

Court upon any other theory of negligence not alleged.

We direct the Court's attention to the following errors in the opinion arising from inaccurate statements of facts or erroneous deductions or conclusions necessarily following from a misconception of facts.

(a) The second paragraph of the opinion states that it is contended (by plaintiff in error) that error was committed by the Court below in denying a motion for nonsuit or instructed verdict in favor of the Mining Company, for the reason that the evidence conclusively shows that it was the duty of Cunningham, before working in the place where he was injured, to *examine the roof of the stope and bar down any loose material that might remain thereon*,—in other words, it was Cunningham's duty to make his place of work safe.

No such contention was made by the company in the Court below, or in this Court, nor did it intend to do so. Certainly, no such contention can be gathered, either from the record, or from our brief.

Tr. p. 44, par. 5;

Tr. p. 46, par. 10;

Tr. p. 136, par. 4.

We admit that such a contention was made to the jury in the Court below;—there Cunningham and his witnesses testified that no such duty rested

upon the muckers;—the company and its witnesses testified to the contrary. A clear conflict of evidence *which the verdict of the jury finally foreclosed in favor of Cunningham.*

Such contention not having been made in this Court, and having no foundation in the record, is, of course, out of place in the opinion, and any reasoning or conclusions based thereon must necessarily be unsound, so far as the merits of this case on this appeal are concerned. For instance, the opinion continues:

“The view of the court below on this branch of the case is shown where, in denying the motion for a nonsuit, it said (quoting the last paragraph of the opinion of the court below in denying the motion for a nonsuit).”

The Court below did not consider “this branch of the case”, for such contention was not made or advanced as a reason why a nonsuit be granted. The language quoted in the opinion as having been used by the learned trial judge was used without reference or thought of any such contention, and in an entirely different sense and understanding.

(b) The opinion states:

“At the place where the accident occurred the hanging wall was graphitic schist.”

This statement is erroneous. The country rock and the hanging-wall in the Keane Wonder Mine is *schist*, and not “*graphitic schist*” (Tr. p. 153). As to this fact there is no controversy.

(c) The opinion recites that

“Between the ore body and the hanging wall there was a gouge, varying in thickness from 1 to 18 inches, and soft, black graphitic schist, the presence of which rendered any body hanging below it likely to become detached from the hanging-wall.”

The only testimony in the record having any reference whatever to this subject is the testimony of Mr. Homer Wilson, the president of the company, found at page 163 of the transcript, as follows:

“The country rock at that mine is schist. The foot wall many times has a dike on it, a diorite dike, but the hanging wall is always schist. There is no gouge on the schist wall to speak of; there is a little—well, no, you can’t call it a gouge proper at all. It is a seam between the quartz and the schist. It is a graphitic schist, caused by grinding and rubbing against it. It varies from the thickness of your hand to 18 inches, always dry. The color of the seam or soft spot is black. The schist wall itself is black, but not quite as dark; there are two kinds of schist, graphitic and mica. The mica schist is a shade lighter than the graphitic. Where this cave was it was of that character, graphitic schist lying right against the other. It lies in slabs. The ore was white quartz carrying two to four per cent sulphides.”

From this testimony no Court could say that there was a gouge between the ore body and the hanging-wall. Mr. Wilson says: *“You can’t call it a gouge proper at all. It is a small seam of dry graphitic schist.”* A gouge is understood, among miners, as being a small soft body with no power whatever

to hold any two bodies together. If this graphitic schist was a true gouge, and there was any evidence in the record establishing the fact that it was such, then this Court would be warranted in its deduction that the presence of such gouge rendered any body hanging below it likely to become detached from the hanging-wall. If it was a gouge, no ore would ever remain on the hanging-wall but all ore would fall of its own weight after shooting the holes drilled by the piston machines.

There is no evidence in the record that the presence of this seam of graphitic schist in any way weakened the connection between the ore body and the hanging-wall proper.

As a matter of fact this small seam of graphitic schist is a feature of this mine. It is there today. It is as hard and as tenacious as the quartz itself. *Great bodies of quartz daily hang suspended from the hanging-wall with this seam of graphitic schist between it and the hanging-wall proper. Cunningham and Perez worked all day on December 9th, 1911, under ore suspended from the hanging-wall (Tr. pp. 84, 114).*

As a matter of fact every miner in that mine works under like conditions. It is the only way to mine the ore. Never in the history of the mine, and the record so disclosss, had any injury to any employe resulted on account of ore falling from the hanging-wall. This seam of graphitic schist is

always present and surely a mining company should have the right to rely upon the law of nature as proven by actual operation and experience. If companies have to guard against every possible injury to employees then the law will close many low grade mines in this state.

It is mere conjecture, and a wholly erroneous and fallacious conclusion, to assume that the presence of this graphitic schist in any way renders the ore body hanging below it dangerous to the employees working thereunder.

The record discloses that the Keane Wonder Mine is a dry mine,—no moisture of any kind. As a fact, and outside of the record, we are able to advise the court that after the quartz has been removed from the hanging-wall, and the outside air and the moisture therefrom comes in contact with the schist, the result is, after a considerable period of time, a year or more, that the schist softens, *as compared with its former condition*, and flakes, and frequently in the old abandoned portions of the mine, the schist falls, but there has never been known in the history of that mine any portion of the schist wall to flake off and fall during the time that the employees are engaged in extracting ore.

The uncontradicted evidence in the case is that after the ore has been removed by the piston machines, the ore on the hanging-wall can only be got down by blasting, with holes drilled not more than 18 inches apart, and exploded by a specially

high power dynamite, and that the ore can not be taken down in any other way.

Tr. pp. 170-171;

Tr. pp. 184-185-186;

Tr. p. 232.

This Court further states:

“The tendency of the blasting which followed the use of the Waugh drills was to loosen the ore which might still remain thereafter on the hanging-wall.”

In view of the testimony above referred to, as to the character of the formation, the toughness of the ore, the method of breaking the ore down from the hanging-wall, and the difficulty experienced in this mine in getting it down, we respectfully submit that the above statement by the court is an unauthorized assumption not supported by evidence and not true as a matter of fact. *There is no evidence that the blasting had any tendency whatever to loosen any of the ore remaining on the hanging-wall.* We believe that we are warranted in stating in this petition that blasting in that mine has no effect whatever on the ore body not immediately affected by the force of the explosion; in other words, never in the history of that mine has any part of the ore body fallen by reason of an explosion in any other part of the mine. The method of extracting the ore is set forth fully in the record. The only way it can be gotten down is by drilling holes and blasting it down, and even after holes are drilled and shots are fired, portions of the ore body

remain on the hanging-wall. There is no controversy in this case on this question.

The evidence shows conclusively that the Mining Company daily inspected the hanging-wall. Cunningham, himself, testified that before any mucker was allowed to go to work that a miner was sent in ahead in order to make the place safe. The company had a foreman, and a superintendent to look after the safety of the mine and its employees. Very frequently the president went through the mine for the purpose of inspection.

The evidence in the case conclusively proves that *whenever any loose rock or dangerous rock was observed it was either barred down or shot down.* The opinion of this Court so holds.

The evidence quoted in the opinion establishes the utmost vigilance and diligence on the part of the company in the matter of inspection and care of the roof or hanging-wall, and the barring down of any loose rock that might be found which might prove dangerous to employees.

It is important to note that the evidence on the part of Cunningham as well as the evidence on the part of the company, conclusively establishes extraordinary caution and care by the company in the operation of its mine. There is no evidence of failure to inspect dangerous conditions, nor is there any evidence that the company failed to bar down any loose rock or remedy any dangerous condition known to it, or which should have been known to it.

The evidence clearly established this most important duty, to wit, *inspection*.

There is no question but that the duties complained of, were discharged by the company; the *contention in the Court below being as to who performed them*.

In order to make a *prima facie* case under the Roseberry Act, Cunningham had to prove that he was injured *whilst engaged in the line of his duty, and in the course of his employment; he also had to prove that the breach of duty charged against the company was not such as he was specially employed to do*. In other words, in order to make a case and escape a nonsuit, it was necessary for Cunningham to prove that it was not a part of his duties to timber the stope in which he was at work, nor was it a part of his duties to examine and inspect the stope for probable dangers, nor was it a part of his duties to pick or bar down the loose rock at the roof or top of the stope. The court is familiar with the rule of law that where an employee is engaged in a hazardous enterprise, and he himself is engaged in such work as brings about a constantly changing condition, or he is specially employed to remedy the dangers causing the injury complained of; that it is the duty of that employee to make his place of work safe, and if he is injured in consequence of failure so to do, he is guilty of such negligence as will bar recovery.

19 L. R. A. 352;

Petaja v. Aurora Mining Co., 106 Mich. 463;

32 L. R. A. 435;

58 A. S. R. 504;

64 N. W. 335;

66 N. W. 951.

This Court should take judicial notice of the fact that driving a stope in an ore body such as is described in the record, is, in the nature of things, a dangerous occupation, one in which the place of work is constantly changing as the work progresses. *Some employee must today make safe the place that he and his fellow employees are to work tomorrow.* That is what he is employed to do. Cunningham, of course, took the position that it was not the duty of the muckers to examine the roof or to bar down loose rock; he placed that duty upon the miners or machine men, and in his effort to shift that responsibility, conclusively proved not only the exercise of ordinary care and diligence which the law demands of the company, but extraordinary precaution and care against the alleged dangers complained of. Calm reflection leaves the impression that there is a world of wisdom in Shakespeare's "*Methinks the lady doth protest too much.*"

As already conceded, the verdict of the jury concludes the controversy as to whose particular duty it was. The evidence in this regard was conflicting. Whether the jury's conclusion was right or wrong the legal consequence to the company was and is that this particular defense was then and there lost to it. *But this does not mean that the company*

is thereby precluded from insisting that Cunningham proves his case by legal and sufficient evidence.

We direct the Court's attention to the language used in the opinion in reference to this subject:

“The defendant contends that this duty of inspection and barring down rested upon the muckers, and argues that *it had discharged its full duty in placing that burden upon the muckers, and that therefore it was not negligent.* But the plaintiff testified otherwise * * * The defendant offered testimony to the contrary. We have nothing to do however, with the weight of the testimony.”

As an abstract proposition the foregoing is undoubtedly correct, but, as we have already said, this Court has in some manner gained an erroneous impression of the position taken by the company on this appeal;—therefore, this and similar parts of the opinion, and the conclusions based thereon, are erroneous, and should be eliminated. If the judgment is to be affirmed, different reasoning should be assigned.

To repeat: the evidence fails to prove negligence on the part of the company, either in not properly timbering the stope, or in not properly examining and inspecting same, or, in not properly picking or barring down the loose rock at the roof or top of the stope.

In fact there is not a scintilla of evidence in the case proving negligence on the part of the company in the particulars charged in the amended complaint, and for which it was hailed into Court to

defend itself. Cunningham proved daily inspection of the dangers complained of, to wit: loose rock at the roof or top of a stope; also that the company never allowed muckers, the class to which he belonged, to go to their place of work unless preceded by an experienced miner who first barred down the loose rock and made the place safe for the mucker, and even after doing so, the mucker did not go to the place until he was told that it was safe. The evidence further established the fact that the company employed two competent and experienced men who daily inspected the mine, Mr. Roper and Mr. Keith. As quoted in the opinion, Cunningham himself testified that

“sometimes the foreman himself would bar down the loose rock and see that the place was safe before we would go in there to work.”

To demand more of the company would be equivalent to saying that it must under all circumstances and conditions make the place of work safe in any event. This the law does not require.

Thompson on Negligence, Vol. IV, p. 370,
Sec. 4191;

26 Cyc. 1102;

Brymer v. S. P. Co., 90 Cal. 496;

Thompson v. California Construction Co.,
148 Cal. 35.

(e) The opinion holds:

“This is not a case in which the only evidence of negligence is the fact of the accident. The jury may have found negligence in the fact

alone that ore was allowed to remain on the hanging-wall, *or that there was want of proper care in inspecting the ore hanging from the roof underneath which the plaintiff was put to work, there being evidence tending to show that a proper inspection and testing of the rock would have disclosed the fact that it was likely to fall.*"

The opinion holds that the verdict of the jury was justified in that there was evidence of want of proper care in inspecting the ore hanging from the roof underneath which plaintiff was put to work. *There is no evidence in this case of negligence or carelessness, however slight, in respect to the duty of inspection.*

In the Court below this question was put at rest by the ruling of the learned trial judge in denying our motion for nonsuit, when he held:

"Hence the failure to inspect does not seem to me to have been established."

The learned trial judge also held:

"There is no showing that any of the employees were incompetent. Much was said about the failure to give warning. When the duty to warn is present, it necessarily predicates not only that there is danger, and reasonable cause therefor, but it also predicates not only that there is danger, and reasonable cause therefor, but it also predicates the fact that the party upon whom the duty is laid must know of the danger, or must have some cause to apprehend it, or could have discovered it if he had performed his duty.

But so far as the evidence shows, such an accident never occurred before. It does not

appear from the testimony that any ore or rock ever fell from the roof of that chamber before. The chamber was in the neighborhood of 600 feet in circumference. It must have been something like 200 feet in diameter. At points the roof was 20 feet from the floor, at others it was in the neighborhood of 60 feet. *The supports and pillars were few in number, but in the absence of any showing that these were insufficient I do not see how we can assume that there was any negligence on that score. If it had appeared that caves were frequent, then there would have been evidence tending to show the company was negligent in failing to have proper supports for the roof, but there is nothing of that sort here.*"

(Tr. pp. 137-140.)

The learned trial judge correctly disposed of the alleged negligence of failure to make proper inspection and examination, and likewise disposed of the duty to warn. The lower Court disposed of every contention raised by the pleadings in favor of the company. *It submitted the case to the jury upon the theory that the falling of the ore itself was a fact tending to show negligence.* The fallacy of this position is that the alleged negligence, to wit: either the falling of the ore itself, or the leaving of an enormous body of ore on the hanging-wall, *was not alleged by Cunningham as a part of his cause of action. Such negligence is entirely without the scope of the pleadings, and was the last straw which the astute counsel for defendant in error grasped in struggling to overcome our motion for nonsuit.*

Cunningham did not complain that it was negligence on the part of the company to allow ore to remain on the hanging-wall, but he did complain that it was negligence to allow loose ore or rock to remain on the hanging-wall where it was liable to fall and injure him while engaged at his work. When we came into court we expected to rebut the charge that we allowed loose rock to remain on the hanging-wall so as to be dangerous to our employees. We expected to rebut the testimony that we were careless and negligent in the matter of inspecting our hanging-wall. We expected to rebut testimony that we failed and neglected to properly timber our mine. This we did successfully, and at the 11th hour, Cunningham switched his position as to alleged negligence and succeeded in convincing the lower Court that the negligence proven and for which the company must respond in damages, was the alleged negligence of leaving a large body of ore on the hanging-wall.

“A material variance between the allegations and the proof in an action by a servant against his master, for personal injuries, is fatal.”

26 Cyc. 1408.

Such a contention is utterly ridiculous. If this Court will carefully read the testimony of Cunningham and his witnesses it will find that every employe in that mine each day worked under a body or ore remaining on the hanging-wall, many times in size and weight the body of ore which fell and

injured plaintiff. It was and is the usual and customary way to work that mine. It was and is necessary to remove the lower portion of the ore by piston machines, allowing the upper portion to remain on the hanging-wall. Miners and muckers worked under this ore on the hanging-wall. There is no evidence of any other accident by reason of the falling of ore from the hanging-wall. No human being has ever been able to get ore down from that hanging-wall after the piston machines have taken out the lower portion, without drilling holes not less than 18 inches apart, and shooting it down with a special high-power dynamite;—and even after holes have been so drilled, loaded and exploded, portions of the ore oftentimes remain on the hanging-wall.

(f) The opinion further states:

“There being evidence tending to show that a proper inspection and testing of the rock would have disclosed the fact that it was likely to fall.”

This is the crux of the case. If there is any evidence in the record showing or tending to show, that a proper inspection and testing would have disclosed the danger, *then we withdraw our petition for rehearing, and consent that the judgment be affirmed,* but there is not a scintilla of evidence in the record, direct or indirect, which in any way proves, or as a matter of law, charges the company with knowledge, that the rock which fell was loose and dangerous, or that it was likely to fall. It

was inspected daily; it was tested by Mr. Roper and Mr. Perez, and pronounced safe. There is no evidence of any fact which in any way charges the company with constructive knowledge of this alleged danger. There is no evidence that plaintiff, or any other employee ever complained that it was dangerous. There is no evidence that the company had any knowledge that it was even loose, and, finally, there is no evidence of any extraneous fact which did, or which should have put the company on inquiry concerning this alleged danger. *In every case of similar character in which a mining company had been held liable by reason of rock or ore falling from the roof of its mine, some fact has existed which either proved that the company had actual knowledge of the danger prior to the accident, or that the fact which came to the knowledge of the company was such that a reasonably prudent man, exercising ordinary care, would have notice of the alleged danger.*

To illustrate our position, and to emphasize the failure of proof in the case at bar we request the Court to examine and consider carefully the following authorities, which we believe to be in line with the weight of authority in this country, and conclusive in our favor:

“Mine owners are bound to exercise reasonable care and skill and to adopt all reasonable means and precautions to lessen the danger to their employes from the falling of portions of the roof of the mine; *but they are not insurers, in favor of their miners, that the roof*

of their mine will be at all times so propped that it absolutely will not fall, either under the principles of the common law, or, it may be assumed, under the statute law."

Thompson on Negligence, Vol. 4, p. 370,
Sec. 4191.

"In order to charge the owner or operator of a coal mine with negligence because of the falling of loose rock or earth from the roof of the mine, he must have had previous knowledge of a defective or dangerous condition of the roof, or, by the exercise of ordinary care and caution, have been able to discover the defective condition."

Cherokee Coal Co. v. Britton, 45 Pac. 100;
Con. Coal Co. v. Scheller, 42 Ill. App. 619;
S. W. V. Co. v. Andrew, 86 Va. 270; 9 S. E.
1015;
Bird v. Utica Mine, 84 Pac. 256;
Grant v. Varney, 40 Pac. 771.

*"The master's liability for injuries to a servant arising from defects in the place for work, * * * is dependent upon his knowledge, actual or constructive, of such defects."*

26 Cyc. 1142.

"A master is not liable for injuries resulting to a servant by reason of latent defects of which he was ignorant, and which could not be discovered in the exercise of reasonable care and diligence."

26 Cyc. 1145, note 92.

"In order to hold a master liable for injuries to his servant alleged to have been caused by

the unsafe methods of work adopted by him, it must be shown that he had, or ought to have had, knowledge of the danger.”

26 Cyc. 1156, note 35.

By way of illustration, we desire to direct the Court's attention to the facts of a number of cases of similar character.

In the case of *Collins v. Greenfield*, 51 N. E. 454, decided by Mr. Justice Holmes, then of the Supreme Court of the State of Massachusetts, a judgment was sustained in favor of plaintiff.

Collins was crushed by a rock which fell upon him. The superintendent put Collins to work. Above him was a large overhanging rock, which looked safe from where Collins was at work, but which in fact was not safe, and had a large crack behind it.

There was evidence that the superintendent had been told that the rock which fell upon Collins could and ought to be barred down without further blasting, and that the superintendent said that he would see it. He did not attend to it; the rock fell. Collins was injured, and the Supreme Court of Massachusetts rightfully held that the defendant was liable for the reason that there was evidence that the superintendent had been notified of the dangerous overhanging rock.

In the case of *Western Anthracite Coal and Coke Co. v. Beaver*, 192 Ill. 333, 61 N. E. 335, a verdict for plaintiff was sustained by the Supreme

Court of the State of Illinois. *There was evidence that the deceased had informed the pit boss that the rock was liable to fall, and that it was dangerous, and that he had ordered props for it, which the boss promised to send, but failed to do so, and the rock fell, causing the death of the employe.* There can be no question but that this case was rightfully decided. Here the pit boss was notified that the rock was dangerous. Props were requested to support it. He promised to send same, but failed to do so.

In the case at bar there is no such evidence of neglect on the part of the Keane Wonder Mining Company.

In the case of Coal Valley Mining Company v. Haywood, 98 Ill. App. 258, it was held that a mine owner is liable if the general manager fails to prop the roof entry, *if he knows that it is dangerous.*

In Bird v. Utica Gold Mining Company, 2 Cal. App. 674, 84 Pac. 256, a verdict in favor of plaintiff was upheld for the reason that the *evidence established that the mining company knew that water was percolating through the ground immediately above the stope, and that by reason thereof the ground had become softened, disintegrated, and loosened, and that therefore it was necessary to furnish props to support the roof, and prevent same from falling. The knowledge of this extraneous fact, to wit, the percolating water, was such as to charge the Mining Company with knowledge of the danger resulting*

from the water, making it necessary that the company support the roof, so loosened by the water, with necessary props or supports.

In the case of *Himrod Coal Co. v. Clark*, 64 N. E. 284, there was evidence that *the mine manager was informed of the dangerous condition of the roof of the mine two days before the accident occurred*. A verdict for plaintiff was sustained for the reason that the company had actual knowledge of the dangerous condition.

Many other cases to the same effect might be cited, but the foregoing are typical, and correctly announce the law applicable to cases of this character.

(g) The opinion concludes as follows:

“And from the whole evidence it is not an unreasonable inference that the place could have been made safe by the use of proper precautions”,

which is equivalent to saying that in any event, and under all conditions, a mining company must make the place of work of its employes absolutely safe. In other words, the employer is an insurer of his employes' safety under all circumstances and conditions. It is so elementary in the law of master and servant that a master is not an insurer of his servants' safety, that we hesitate to cite authority, but in order to emphasize the error of the opinion in this regard, we submit an unquestioned authority:

In the case of *Thompson v. California Construction Company*, 148 Cal. 35, the Supreme Court of California said:

“The law imposes on a master or employer only the obligation to use reasonable or ordinary care, skill and diligence in procuring and furnishing suitable and safe machinery and appliances for the servant to perform the duties for which he is engaged. The statement that it is the duty of the employer to furnish an employe with a reasonably safe place in which to work is a defective statement of the law. *The duty of the employer in this respect is not absolute. He is not required at all hazards to furnish a reasonably safe place. His duty is fulfilled when he exercises ordinary care for that purpose.* * * *

We think the motion for a nonsuit should have been granted. The evidence shows that the defendant was in control of a rock quarry in which the plaintiff was employed; that the business carried on was that of blasting rock out of a cliff of rock some fifty or sixty feet high, and loading large, irregular pieces of rock thus obtained upon cars standing at the foot of the slope upon which the rock lay. * * *

There is no evidence that the defendant or any of its agents or servants had any better knowledge, or any better means of knowledge of the danger arising from the sliding of rocks down the cliff than that possessed by the plaintiff. * * *

The rule applicable to such cases is that the master is not liable for dangers existing in the place where the servant is assigned to work unless the master knows of the dangers or defects, or might have known thereof if he used ordinary care or skill to ascertain them. * * *

The plaintiff had the burden of proving that his injury was due to the negligence of the defendant. There was no evidence of such neglect other than the fact that the rock slipped down and caused the injury. Under the circumstances above stated, the mere hap-

pening of the accident is not *prima facie* evidence of neglect on the part of the master. * * *

The motion for nonsuit should have been granted upon the ground that it is now shown that the defendant was negligent with respect to the safety of the place in which the plaintiff was at work at the time of the injury."

(h) The theory upon which this case was submitted to the jury was the fact that "*ore was allowed to remain on the hanging-wall*".

This Court has approved it. To so hold means that the doctrine of *res ipsa loquitur* is applied. *This is error.* The United States Supreme Court and this Court have held this doctrine inapplicable to the relations of master and servant.

Patton v. Tex. & Pac. Ry. Co., 179 U. S. 658;
Mt. Copper Co. v. Van Buren, 123 Fed. 61.

II.

The opinion holds:

"*Some of the state courts have adopted a restricted rule of interstate comity which, if applied in this case, would fully sustain the defendant's contention.* But in the Federal Courts, following the lead of the Dennick case, in which Mr. Justice Miller declared a liberal rule of comity, the tendency has been to establish a broader rule, a rule which concurs, we think, with enlightened procedure, justice and common sense."

The vice of applying the doctrine of the Dennick case to the case at bar lies in the fact, that to do so this Court must apply a doctrine contrary to the rule declared by the Supreme Court of the State of Nevada.

In determining questions of this character it is the established rule that Federal Courts will treat the question exactly the same way as though it were a court of the state in which it was sitting. In other words, in applying the doctrine of comity to this case, this Court should apply the doctrine which has been declared by the Supreme Court of the State of Nevada.

56 L. R. A. 197.

The restricted rule of interstate comity which the opinion concedes has been adopted by some of the states, is the rule adopted by the State of Nevada.

Christensen v. Floriston Pulp and Paper Co.,
29 Nev. 552; 92 Pac. 210.

The weight of authority holds that when a cause of action depends upon a statute of another state, that there must be a statute in the forum similar to that of the place where the cause of action arose.

56 L. R. A. 203, and cases cited.

A few of the states have adopted a contrary rule, holding against the necessity of a similar statute in the forum.

Herrick v. Minnesota Ry., 31 Minn. 11; 56 L. R. A. 204.

The Dennick case is not an authority for the liberal rule of comity which this Court has applied in this case, *for the reason that in that case there was in fact a statute in New York, where the action was, similar to that of New Jersey, where the cause of action arose.* Hence the question was not presented, and did not arise, and therefore this case should not be deemed an authority upon so important a point, as at most the language used was dictum. We submit that this Court should be thoroughly convinced of the correctness of its position before applying the doctrine of the Dennick case, for the reason that to do so would be contrary to the established law of the State of Nevada on the same subject.

The Mining Company in this case is in rather an anomalous position. We are sued in the State of Nevada for damages for an accident happening within the State of California. Admittedly the substantive law of California is different than the substantive law of the State of Nevada. The lower Court applied the substantive law of California, and the adjective law of Nevada. This Court applies what may be termed the federal doctrine; entirely different from either California or Nevada.

The United States Supreme Court in *Stewart v. Baltimore Railway*, 168 U. S. 445, expressly recognized the distinction which we make in this case when it said:

“Where the statute of the State in which the cause of action arose is not in substance inconsistent with the statutes or public policy of the state in which the right of action is sought to be enforced.”

There can be no question but that the statute law of the State of California applicable to this case is radically and fundamentally different from the statute law of the State of Nevada.

The public policy of a state is to be determined by its statute law, and it is not necessary that a law be against good morals to be contrary to the public policy of a sister state. Numerous decisions can be cited which so hold.

The law is correctly declared in a very liberal note covering the entire subject, found at 56 L. R. A. 193. We submit, therefore, that in determining this branch of the case the law applicable thereto, as declared by the Supreme Court of Nevada, should be adopted and applied by this Court.

III.

Damages to the amount of twelve thousand five hundred dollars (\$12,500) were awarded to Cunningham for a broken leg, and this amount by a jury of the State of Nevada under a law of the State of California depriving the Mining Company of the defense of contributory negligence, but per-

mitting such defense under what is known as the comparative negligence doctrine.

Cunningham was an ordinary day laborer, uneducated, unskilled, and, at the time of his injury, was receiving a wage of \$4 per day.

He was in good health, was not suffering under any disability, and a man of ordinary intelligence. He knew of the ore on the hanging-wall. He was not deceived in any way. He made no objection to working in that mine. He made no request that the ore be removed, or that the mine be timbered at this particular point. As a matter of fact the evidence discloses that he had as much, if not more knowledge, than the Mining Company in reference to the danger complained of. We are unable to understand wherein there is any greater degree of negligence on the part of the Mining Company than on the part of Cunningham. *A servant may not disregard an obvious and well known peril. If he does so, and is injured, it is contributory negligence, which bars recovery.*

Brett v. S. H. Frank Co., 153 Cal. 267.

In any event, the damages awarded are excessive.

For the same injuries Cunningham would receive under the Workmen's Compensation, Insurance and Safety Act of the State of California, a maximum of 65% of his average weekly earnings for a period of two hundred and forty weeks, which in this case would amount to a total of three thousand, seven hundred and twenty dollars (\$3,720). He would

also be entitled to 20% of such weekly earnings during the remainder of life, which would amount to the sum of five dollars (\$5) per week, or a total of two hundred and fifty dollars (\$250) a year. Four thousand dollars properly invested would produce sufficient income to make this payment. Therefore, the sum of seven thousand, seven hundred and twenty dollars (\$7,720) would be the maximum amount which he would be paid under the present law, recognized to be most liberal in behalf of employes.

We know of no cases of upholding a verdict of this magnitude for a broken leg, *especially where no wilful misconduct is proved against the employer.*

For the foregoing reasons, and that we may have an opportunity to more clearly present the case, we respectfully ask that a rehearing be granted.

Dated, San Francisco,

June 2, 1915.

GAVIN McNAB,
SWEENEY & MOREHOUSE,
B. M. AIKINS,
A. H. JARMAN,

*Attorneys for Plaintiff in Error
and Petitioner.*

CERTIFICATE OF COUNSEL.

I hereby certify that I am of counsel for plaintiff in error and petitioner in the above-entitled cause, and that in my judgment the foregoing petition is well founded in point of law, as well as in fact, and that said petition is not interposed for delay.

A. H. JARMAN,
*Of Counsel for Plaintiff in Error
and Petitioner.*

No. 2496

In the United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

NATIONAL MERCANTILE COMPANY, LIM-
ITED, a Corporation,

Appellant.

VS.

R. A. WATSON, Corporation Commissioner, and
Others,

Appellees.

TRANSCRIPT OF RECORD.

Upon Appeal from the District Court of the United
States for the District of Oregon.

Filed

OCT 16 1914

F. D. Monckton,

Clerk.
Metropolitan Press, Portland, Ore.

No.

In the United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

**NATIONAL MERCANTILE COMPANY, LIM-
ITED, a Corporation,**

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Others,**

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TRANSCRIPT OF RECORD.

**Upon Appeal from the District Court of the United
States for the District of Oregon.**

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In the United States Circuit Court of Appeals
for the Ninth Circuit

NATIONAL MERCANTILE COMPANY, LIM-
ITED, a Corporation,

Appellant.

vs.

R. A. WATSON, Corporation Commissioner, and
Others,

Appellees.

Names and Addresses of Attorneys of Record.

A. K. WILSON, O. A. NEAL and GEORGE
ROSSMAN, Chamber of Commerce Building,
Portland, for the Appellant.

M. L. PIPES, JOHN M. PIPES and GEORGE
A. PIPES for the Appellee, R. A. Watson, Cor-
poration Commissioner.

A. M. CRAWFORD, Attorney General, Salem, Ore-
gon, and WALTER H. EVANS, District At-
torney for Multnomah County, and ARTHUR A.
MURPHY, Deputy District Attorney for Multno-
mah County, County Court House, Portland, Ore-
gon, for all the defendants except R. A. Watson.

*In the District Court of the United States, for the Dis-
trict of Oregon.*

THE NATIONAL MERCANTILE COM-
PANY, LIMITED, a Corporation,

Plaintiff,

vs.

R. A. WATSON, Corporation Commissioner;
A. M. CRAWFORD, Attorney General;

WALTER H. EVANS, Dist. Atty. in Multnomah Co.; JOHN IRWIN, Dist. Atty. in Klamath County; E. E. KELLY, Dist. Atty. in Jackson County; GEORGE M. BROWN, Dist. Atty. in Douglas County; JOSEPH M. DEVERS, Dist. Atty. in Lane County; ARTHUR CLARKE, Dist. Atty. in Benton County; LAWRENCE A. LILJEQUIST, Dist. Atty. in Coos County; GALE S. HILL, Dist. Atty. in Linn County; ERNEST R. RINGO, Dist. Atty. in Marion County; GILBERT L. HEDGES, Dist. Atty. in Clackamas County; D. H. UPJOHN, Dist. Atty. in Polk County; E. B. TONGUE, Dist. Atty. in Washington County; C. W. MULLENS, Dist. Atty. in Clatsop County; W. B. DILLARD, Dist. Atty. in Columbia County; W. A. BELL, Dist. Atty. in Wasco County; FREDERICK H. STEIWER, Dist. Atty. in Umatilla County; S. T. GODWIN, Dist. Atty. in Baker County,

Defendants.

Citation.

United States of America,
District of Oregon,—ss.

To R. A. Watson, Corporation Commissioner, and to Pipes, Pipes & Pipes, his solicitors; and to A. M. Crawford, Attorney General; Walter H. Evans, District Attorney in Multnomah County; John Irwin, District Attorney in Klamath County; E. E. Kelly, District

Attorney in Jackson County; George M. Brown, District Attorney in Douglas County; Joseph M. Devers, District Attorney in Lane County; Arthur Clarke, District Attorney in Benton County; Lawrence A. Liljequist, District Attorney in Coos County; Gale S. Hill, District Attorney in Linn County; Ernest R. Ringo, District Attorney in Marion County; Gilbert L. Hedges, District Attorney in Clackamas County; D. H. Upjohn, District Attorney in Polk County; E. B. Tongue, District Attorney in Washington County; C. W. Mullens, District Attorney in Clatsop County; W. B. Dillard, District Attorney in Columbia County; W. A. Bell, District Attorney in Wasco County; Frederick H. Steiwer, District Attorney in Umatilla County; and S. T. Godwin, District Attorney in Baker County; and to A. M. Crawford, Walter H. Evans and Arthur A. Murphy, Solicitors for all the Defendants except R. A. Watson:

WHEREAS, The National Mercantile Company, Limited, a corporation, plaintiff in the above entitled cause, has lately appealed to the United States Circuit Court of Appeals, for the Ninth Circuit, from a decree rendered in the District Court of the United States for the District of Oregon, in your favor, and has given the security required by law, you are, therefore, hereby cited and admonished to be and appear before said United States Circuit Court of Appeals, for the Ninth Circuit, at San Francisco, California, within thirty days from the date hereof, and show cause, if any there be, why the said decree should not be corrected, and speedy

justice should not be done to the parties in that behalf.

WITNESS the Honorable Robert S. Bean, United States District Judge for the District of Oregon, this 10th day of September, 1914.

R. S. BEAN,
Judge.

District of Oregon,
County of Multnomah,—ss.

Due service of the within citation on appeal is hereby accepted in Multnomah County, Oregon, this 10th day of September, 1914, by receiving a copy thereof, duly certified to as such by O. A. Neal, one of the attorneys for plaintiff.

MARTIN L. PIPES,
Attorney for Defendant, R. A. Watson.

WALTER H. EVANS,
Attorney for all the Defendants except said Defendant, R. A. Watson.

Filed September 10, 1914. G. H. Marsh, Clerk.

In the District Court of the United States for the District of Oregon.

March Term, 1914.

BE IT REMEMBERED, That on the 20th day of April, 1914, there was duly filed in the District Court of the United States for the District of Oregon, a Bill of Complaint in words and figures as follows, to wit:

Bill of Complaint.

R. A. Watson, Corporation Commissioner, et al. 5
In the District Court of the United States for the Dis-
trict of Oregon.

THE NATIONAL MERCANTILE COM-
PANY, LIMITED, a Corporation,
Plaintiff,

vs.

R. A. WATSON, Corporation Commissioner;
A. M. CRAWFORD, Attorney General;
WALTER H. EVANS, Dist. Atty. in
Multnomah County; JOHN IRWIN, Dist.
Atty. in Klamath County; E. E. KELLY,
Dist. Atty. in Jackson County; GEORGE
M. BROWN, Dist. Atty. in Douglas Coun-
ty; JOSEPH M. DEVERS, Dist. Atty. in
Lane County; ARTHUR CLARKE, Dist.
Atty. in Benton County; LAWRENCE
LILJEQUIST, Dist. Atty. in Coos Coun-
ty; GALE S. HILL, Dist. Atty. in Linn
County; ERNEST R. RINGO, Dist.
Atty. in Marion County; GILBERT L.
HEDGES, Dist. Atty. in Clackamas Coun-
ty; D. H. UPJOHN, Dist. Atty. in Polk
County; E. B. TONGUE, Dist. Atty. in
Washington County; C. W. MULLENS,
Dist. Atty. in Clatsop County; W. B. DIL-
LARD, Dist. Atty. in Columbia County;
W. A. BELL, Dist. Atty. in Wasco Coun-
ty; FREDERICK H. STEIWER, Dist.
Atty. in Umatilla County; C. T. GODWIN,
Dist. Atty. in Baker County,

Defendants.

In Equity.

To the Honorable Judge of the District Court of the
United States in and for the District of Oregon:

In Equity.

1.

The National Mercantile Company, Limited, a corporation organized and existing under the laws of the Province of British Columbia, Dominion of Canada, and having general offices and principal place of business in the City of Vancouver, Province of British Columbia, Dominion of Canada, brings this its bill against R. A. Watson, Corporation Commissioner; A. M. Crawford, Attorney General; Walter H. Evans, District Attorney in Multnomah County, Oregon; John Irwin, District Attorney in Klamath County, Oregon; E. E. Kelly, District Attorney in Jackson County, Oregon; George M. Brown, District Attorney in Douglas County, Oregon; Joseph M. Devers, District Attorney in Lane County, Oregon; Arthur Clarke, District Attorney in Benton County, Oregon; Lawrence A. Liljequist, District Attorney in Coos County, Oregon; Gale S. Hill, District Attorney in Linn County, Oregon; Ernest R. Ringo, District Attorney in Marion County, Oregon; Gilbert L. Hedges, District Attorney in Clackamas County, Oregon; D. H. Upjohn, District Attorney in Polk County, Oregon; E. B. Tongue, District Attorney in Washington County, Oregon; C. W. Mullens, District Attorney in Clatsop County, Oregon; W. B. Dillard, District Attorney in Columbia County, Oregon; W. A. Bell, District Attorney in Wasco County, Oregon; Frederick H. Steiwer, District Attorney in Umatilla County, Oregon; C. T. Godwin,

District Attorney in Baker County, Oregon; all in the State of Oregon, and for its cause of suit plaintiff states as follows:

II.

This is a suit between citizens of different States; that the value of matters in this controversy herein exceeds the sum of three thousand dollars, exclusive of interest and costs, as set forth more fully hereinafter.

III.

The jurisdiction of this Honorable Court is invoked because and by reason of the federal issues involved in this suit, as more fully set forth hereinafter, and the equity jurisdiction of this Court is sought to avoid a multiplicity of suits, and to prevent irreparable loss and injury to the business and property of the plaintiff, as hereinafter set forth, and because the plaintiff has no adequate remedy at law.

IV.

That this plaintiff is regularly engaged in the business of loaning money upon mortgage security upon real property, and issues contracts to prospective borrowers, whereby such borrowers are placed in groups of 100, in the consecutive order of the signing of these contracts, and, upon the accumulation of sufficient funds in the loan fund of the plaintiff, become entitled to loans in their consecutive order; that the general plan of operation by which this plaintiff conducts its business, hereinbefore stated, is as follows:

The plaintiff maintains offices in many cities of the different states of the United States of America, and

also in the many cities of the various provinces of the Dominion of Canada, and appoints agents who have charge of certain allotted amounts of territory.

That a prospective borrower who desires a loan is required to sign an application therefor of the Company's representative, and, in the said application, states, for the information of the plaintiff, the amount of loan which he desires, and that he has read over a copy of the loan contract and understands its terms, and is familiar therewith; and at that time pays to the said representative one-onehundredth (1-100) of the amount of the desired loan as an evidence of his earnest intention. At the same time the said representative places an application with the plaintiff for the said loan.

That the plaintiff's general agent in Oregon is A. D. Baker, whose office address is Room 723, Chamber of Commerce Building, Portland, Oregon, in which city and state he regularly resides. That when the said application is approved by the plaintiff, the plaintiff issues to said A. D. Baker an undertaking, under seal, whereby the plaintiff, in consideration of the payment of 1-100 of the amount of the desired loan each month, undertakes and agrees to pay to the said A. D. Baker the amount of the loan desired as soon as the loan fund of the plaintiff contains a sufficient amount of money to make up the said loan; that the said undertakings by their express terms are assignable, and the said A. D. Baker, upon the receipt of the said undertakings, at once assigns the same over in writing to the prospective borrower, who thereupon makes his payments to the said Baker or the plaintiff, at the option of the borrower.

That the said loan fund of the plaintiff is composed of the said monthly installments, together with repayment of the various loans made by it, as herein described; that the loans made by the plaintiff to its various borrowers are secured by mortgages upon real property in Oregon and wherever its borrowers live, and draw three per cent annual interest. That the said loans are repaid to the plaintiff by the borrowers in monthly installments of 70 cents per month on each \$100.00 borrowed, with interest at 3 per cent. That the plaintiff likewise sells the people of Oregon, and elsewhere, matured contracts, ready for loans, which loans, when made, pay to plaintiff five per cent annual interest. That the said applications for loans, as soon as received by the plaintiff, are at once given a consecutive number in the order of their receipt, and are placed in classes of one hundred, and the payments made upon the groups of contracts of one hundred are kept in individual funds, and the contract holder in each group of one hundred having the oldest date is the first to secure a loan, and thereafter the loans are made in the chronological order of the issue of the contracts. That a copy of such contract, in blank, is hereto attached and marked Exhibit "1;" that a copy of such application to said A. D. Baker is hereto attached, marked Exhibit "2," and a copy of said application from said A. D. Baker to the plaintiff is hereto attached and marked Exhibit "3," all of which are hereby referred to and made a part hereof by reference thereto.

V.

That the home office and business affairs of the plaintiff are conducted in the City of Vancouver, Prov-

ince of British Columbia, Dominion of Canada, and the business affairs of the plaintiff are administered in accordance with the laws and regulations of the said sovereignty, and all conducted in lawful, honest and meritorious manner.

VI.

That the plaintiff, by its agents and representatives, is offering in the State of Oregon to take applications for such loans, and to enter into contracts with borrowers for loans; that your plaintiff, by advertisement and otherwise, professes the business of taking applications for loans, and making such loans, and entering into contracts for such loans, is engaged in such business in the State of Oregon as above described; that the taking of such applications and the making of such contracts, as above set forth, are in the course of continuous and successive transactions of a similar nature, and your plaintiff is not, in taking applications and in making of such loans, acting in a trust capacity created by law.

VII.

That the plaintiff has been engaged in said loan business since the month of October, 1912, since which time it has vigorously conducted its business; that the plaintiff has invested in said business large sums of money, and has from time to time acquired mortgages and other securities of great value, and now has outstanding a large number of said contracts of great value, of the kind described in the preceding paragraphs; that the plaintiff has likewise contracted from time to time to make such loans of the kind heretofore described.

VIII.

That, in the course of said business, the plaintiff has expended and invested large sums of money in advertising and in the establishment of its said business, and has acquired in the course of such business a valuable goodwill, and an extensive clientele; that the plaintiff has acquired valuable information as to the conduct of its business, and information as to the names and addresses of persons, firms and corporations who desire loans of the character above described; that it has acquired such valuable goodwill, information and other property, as above described, in the State of Oregon; that the plaintiff sends into the State of Oregon its agents and employees who there solicit applications for loans, as hereinbefore described, and transmit such applications to your plaintiff in Vancouver, B. C., and make such loans in the State of Oregon; that such applications are accepted by your plaintiff in Vancouver, British Columbia, and such contracts are then forwarded to such contract holders in Oregon from the offices of the plaintiff in Vancouver, British Columbia.

IX.

That the representations made by your plaintiff, and its agents and representatives, as to the contracts and applications therefor and loans, are true representations.

X.

That the plaintiff further shows that it has been, and now is, solicited by various persons, firms and corporations to secure applications for loans and loans, as pre-

viously described; that it has contracted to make such loans, and the owners of such contracts therefor have undertaken and agreed to pay the plaintiff a compensation, as previously described, for such loans.

XI.

That your plaintiff, and those who now solicit the plaintiff for such loans in Oregon, and those with whom the plaintiff has agreements as to such loans, have been informed that such loans, the kind hereinbefore described, can not be made in Oregon, unless full compliance is made by the plaintiff with Chapter 341, General Laws of Oregon for 1913, which became effective the 3rd day of June, 1913.

XII.

Your plaintiff further charges that said Act. No. 341 of the General Laws of Oregon of 1913, of the Legislature of the State of Oregon, is entitled: "An Act to protect purchasers of stocks and bonds and prevent fraud in the sale thereof; to create a corporation department to administer this and other laws relative to the regulation and supervision of corporations, and providing penalties for the violation hereof." A copy of said Act is hereto attached and marked "Exhibit A" and made a part of this, your plaintiff's bill of complaint.

XIII.

That said Act. No. 341 of the General Laws of Oregon of 1913 purports to establish a department in the State of Oregon, to be known as the "Corporation Department," and provides that the same shall be in charge

of the chief officer known as the Corporation Commissioner, which commissioner is by said Act given power, and upon him is imposed the duty to administer and to provide for the enforcement of the provisions of said Act; that said Act purports to define foreign and domestic investment companies, and to include in such definition every corporation, copartnership or company, other than municipal or governmental corporations, state and national banks, trust companies, building and loan associations, and corporations not organized for profit, organized under the laws of any state, territory or government, which shall by itself or by or through others sell or negotiate for the sale of any stocks, bonds or other securities issued by it within the State of Oregon. That the Oregon Corporation Commissioner, the defendant herein, R. A. Watson, as your plaintiff is informed and believes, construes the said Act to embrace within such definition of said investment company any corporation or copartnership or company which shall, by itself or through others, take an application for, contract for, or make a loan upon real property within the State of Oregon in the manner in which the plaintiff is conducting its business, as hereinbefore described, and includes therein the contracts and mortgages issued and held by this plaintiff, and holds the same are securities as defined by said Act.

XIV.

That the said Act, in Sec. 4 thereof, defines the name "agent" to include any person who shall act for any investment company or stock broker, in offering for sale, taking subscriptions for or negotiating for the sale,

or selling, any securities for any investment company or stock broker, either as an employee on salary or for commission, and the said Watson holds that the said A. D. Baker is such an agent.

XV.

The said Act likewise provides that, before offering for sale, or attempting to sell, any stocks, bonds or other securities, the investment company, whether domestic or foreign, shall file with the Oregon Corporation Commissioner certain statements and documents especially provided for in Sec. 10 of the said Act, which statements and documents shall be authentic, as therein provided, and shall contain such itemized accounts of its financial condition, assets and liabilities, and such other information as to its business and affairs as is required by the said Act, and is required by the said Oregon Corporation Commissioner; and that the said Act likewise provides for the payment of certain fees to the said Oregon Corporation Commissioner, likewise to be paid before offering for sale or attempting to sell such stocks, bonds or other securities. The said Act further provides that the said Oregon Corporation Commissioner may, in his discretion, waive the filing of any of the documents or information required by said section, when the securities to be sold by the stock broker or investment company are listed in "current standard manuals of investment," or when there shall be furnished other evidence of the solvency or the reliability of the stock broker or investment company that shall be satisfactory to the said Commissioner.

XVI.

That the said Act does further provide, in Sec. 12 thereof, that, upon the filing of said statements and documents with the said Oregon Corporation Commissioner, as provided in the preceding sections of the said Act. and upon an examination by the said Commissioner of the business affairs of the company, and upon the filing of such statements and documents, which the aforesaid Commissioner shall deem it advisable to have filed, the said Commissioner shall examine such statements and the results of such examination, and if, after such examination such Commissioner shall find that such company offering or desiring to sell such stocks, bonds or other securities is not solvent, or that the articles of incorporation, its constitution, by-laws or proposed plan of business are not safe, fair, just and equitable, the Commissioner shall not grant such a company a permit to do business, and shall notify such investment company, in writing, of his decision; or, if said Commissioner finds that such articles of incorporation or association, charter, constitution, by-laws, plan of business or proposed contract contains any provision that is unsafe, unfair, unjust, inequitable or oppressive to any class of contributors or customers, or if he decides from his examination of its affairs that the said investment company is not solvent, or does not intend to do a fair and honest business, then he shall not grant such a company a permit to do business and shall notify such investment company, in writing, of his decision.

XVII.

Said Act provides, and especially in Sec. 9, that it

shall be unlawful for any domestic or foreign investment company or stock broker, or any representative thereof, to sell, offer for sale, take subscriptions for, or negotiate for the sale of any stocks, bonds or other securities of any kind or character other than those specifically exempted in the provisions of the said Act, without a permit from the Corporation Commissioner, as in said Act provided.

XVIII.

That said Act, and especially in Sec. 18 thereof, provides that every investment company, and every stock broker, domestic or foreign, shall file as of the close of business on June 30th of each year, and at such other times as required by the Corporation Commissioner, a certified statement, in such form as may be prescribed, setting forth its financial condition and the amount of its assets and liabilities, and furnish such other information as the Corporation Commissioner may require; such statement shall be accompanied by a filing fee of two dollars. Any investment company failing to file such report within fifteen days of the said date of June 30th of each year, or failing to give any other or special report, as provided, within thirty days after receipt of request, shall forfeit its rights to do business in Oregon, and shall be subject to such further penalties as provided in the said Act.

XIX.

The said Act, and especially Sec. 19 thereof, provides that the general accounts of every investment company, domestic or foreign, doing business in Oregon, shall be kept by a certain system of bookkeeping, and a

trial balance thereof shall be taken at least once in each quarter, and such trial balance shall be recorded in a separate book kept for that purpose; that such book and all the books and accounts of such company shall at all times during business hours, except on Sundays and holidays, be open to the inspection of the Corporation Commissioner and his deputies.

XX.

That the said Act, and especially Sec. 30 thereof, provides that the Oregon Corporation Commissioner shall have general supervision over all investment companies, domestic or foreign, all stock brokers and all corporations, joint companies and associations doing business in Oregon, and that same shall be subject to examination by the Commissioner at any time he shall deem advisable, and in the same manner as is now provided in Oregon for the examination of state banks, and the rights, powers and privileges of the Corporation Commissioner, in connection with such examination, shall be the same as is now provided in Oregon with reference to the examination of state banks, or the state banking department.

XXI.

That the said Act, and especially Sec. 15 thereof, provides that no amendment to the charter, articles of incorporation, constitution and by-laws of any investment company for increase or decrease of its capital stock shall become effective until a copy of the same has been filed with and approved by the Corporation Commissioner as provided in regard to the original filing of

such charter, articles of incorporation, constitution and by-laws. Nor shall it be lawful for any such company to transact business on any other plan than set forth in the statement required to be filed by Sec. 10 of the said Act, set forth in Paragraph XV. of this complaint, or to make any contracts for the sale of stocks, bonds or securities other than shown by the requirements of said Sec. 10 of the said Act, until a written statement showing in full detail the proposed new plan of transacting business shall have been filed with the said Commissioner, in like manner as provided in regard to the original plan of business and proposed contract, and the consent of the Commissioner obtained in regard to such proposed new plan.

XXII.

That the said Act, and especially Sec. 16 thereof, provides that it shall be unlawful for any investment company, stock broker or agent to issue, circulate or deliver any advertisement, pamphlet, circular or other document in regard to the stocks, bonds or securities in the State of Oregon until such company or broker shall have been licensed to sell such securities in the State of Oregon, as provided in said Act, and that it shall be unlawful for any licensed investment company or stock broker or agent to issue, circulate or deliver any such advertisement, pamphlet, circular or other document unless the same shall be signed and bear the serial number, and a copy thereof shall first have been filed with the Corporation Commissioner, and the approval of the Commissioner obtained thereto; and if thereafter the

Commissioner shall object to such advertisement then it shall also be unlawful to circulate the same.

XXIII.

That the said Act, and especially Sec. 17 thereof, provides that any investment company or stock broker may appoint one or more agents, which agent before he can do business, must first register with the Corporation Commissioner as agent for such investment company or stock broker, and for each such registration there shall be paid to the Commissioner the sum of \$2.00, such registration entitling such agent to represent said investment company or stock broker until the first day of July following, when it shall be necessary to re-register. Such appointment shall be subject to revocation at any time by the Commissioner.

XXIV.

That said Act, and especially Section 23 thereof, provides that any person who shall knowingly or wilfully subscribe to, or make or cause to be made any false statement or false entry in any book of any investment company, or exhibit any false paper with the intention of deceiving any person authorized to examine into the affairs of such stock broker or investment company, or make or publish any false statement of the financial condition of such investment company or the stocks, bonds or other securities by it offered for sale, shall be deemed guilty of a felony, and, upon conviction thereof shall be fined not more than ten thousand dollars, or imprisonment in the state prison of the State for not more than ten years, or both such fine and imprisonment.

XXV.

Said Act further provides in Sec. 27 thereof that the records of the Corporation Department shall be public records, and information shall be furnished to anyone affected by the corporation laws upon the application therefor, except that the Corporation Commissioner may, in his discretion, withhold information relating to the private affairs of solvent corporations when, in his judgment, the same shall be required for the public welfare.

XXVI.

That the said Act provides, among other things, and particularly in Sec. 3 thereof, that the term "stock broker," as used in said Act, shall include every person, set of persons, association, company, co-partnership or corporation, whether organized under the laws of the State of Oregon, or any other state, territory or government, who shall deal in stocks, bonds or other securities covered by said Act, or who shall sell, offer or negotiate for sale, any stocks, bonds or securities covered by said Act, underwriting or purchasing such securities and reselling at a commission or profit; and said Act, especially in Sec. 4 thereof, provides that the name "agent" as used in said Act shall include any person who shall act for any investment company or stock broker in offering for sale, taking subscriptions for or negotiating for the sale, or selling any securities for any such company or such broker, either as employee on a salary basis or for a commission; and further provides that such sale, when made by individual owners for their own account exclusively, and not made in the course of repeated or continuing

transactions of a similar nature, shall not render the owner subject to the provisions of said Act.

XXVII.

The said Act provides, especially in Sec. 13 thereof, that the foregoing Sections 10, 11 and 12, heretofore mentioned, shall apply to stock brokers, but that such stock brokers shall not be required to file a copy of each stock, bond or other security he shall handle, and that any person applying to the Corporation Commissioner for a permit to do business as a stock broker shall furnish evidence (to be confirmed by the Commissioner's investigation) establishing the sound moral character and good business repute of the person applying, and showing for what length of time and in what capacity he has been engaged in the sale of securities; also a statement of the names, residences and business addresses of all persons interested as principals, officers, directors and as managing or sales agents, and the nature and interest of each, also a statement of their assets and liabilities, and such other information as the Commissioner may require. The permit rendered by the Commissioner to such stock broker shall entitle such stock broker to handle such stocks, bonds and other securities in Oregon as are not objected to by the Corporation Commissioner, providing, that such stock brokers shall file on the first day of each month a list of the stocks, bonds and other securities on hand for sale and handled by him during the preceding month. Said Act further provides that said Commissioner may prohibit said stock broker from handling any of such issues at any time, or to cancel said broker's permit whenever he shall decide that said broker

is not handling such securities as he deems good, legitimate investment.

XXVIII.

Said Act further provides, that it shall be unlawful for any person to sell any securities specified in the Act unless the corporation, association, co-partnership, firm, person, agent or broker offering same for sale shall have complied with the Act, or unless such securities have been listed with the Commissioner; that it shall be unlawful to sell same after any dealer or investment company shall have received a notice not to sell such securities, and that any person violating any of the provisions of this section shall be deemed guilty of a felony, and, upon conviction thereof, shall be fined for each offence not more than ten thousand dollars or imprisonment in the State prison.

XXIX.

The said Act further provides, and especially in Section 14 thereof, that an appeal may be taken from the decision of the Corporation Commissioner refusing to grant a charter or certificate of authority to any stock broker or investment company, to the Circuit Court of the State of Oregon, for Marion County. Such appeal shall be taken by filing with the Clerk of said Court a certified transcript of all papers in the Commissioner's hands relative to such decision. The said Court shall be limited to a consideration of whether there has been an abuse of discretion on the part of the Commissioner in making such decision. Such appeal shall be tried and determined by the Court in a summary way, but other-

wise as a suit in equity. The said Act provides no other method at all of appeal from the findings of such Commissioner.

XXX.

The said Act provides, especially in Sec. 21 thereof, that whenever it shall appear to the said Commissioner that the assets of any investment company or stock broker doing business in Oregon, are impaired to the extent that such assets do not equal the liabilities, or that it is conducting its business in an unsafe, inequitable or unauthorized manner, and is jeopardizing the interests of its stockholders or investors in stocks, bonds or other securities by it offered for sale; or whenever any investment company or stock broker shall fail or refuse to file papers, statements or documents required by said agent, without giving satisfactory reasons therefor, said Commissioner shall at once cancel its permit, and, if he shall deem it advisable, shall communicate such facts to the Attorney General, who shall thereupon make an investigation and, if the facts presented to him by said Commissioner are substantiated, shall apply to a court for the appointment of a receiver to take charge of and wind up the business and affairs of such investment company or stock broker, and such facts found true shall be sufficient evidence to authorize the appointment of a receiver and the foregoing procedure.

XXXI.

It is provided in said Act, and especially in Sec. 22 thereof, that it shall be unlawful for any investment company to issue, sell or distribute any stocks, bonds or

other securities on any other conditions than those set forth in its application without the approval of the Corporation Commissioner, and it shall be unlawful for any investment company to pay any dividends in stocks, bonds or other securities without the approval of the said Commissioner.

XXXII.

That the said Corporation Commissioner has addressed many public meetings in the State of Oregon, and has declared and written to the public his intentions to enforce the provisions of said Act, and his intention to prevent any sale or offer for sale in Oregon of securities covered and regulated by said Act, and as to which the issuer thereof or the seller thereof has not in all respects complied with said Act, and declared his intention to enforce the penalties in said Act set forth for any violation thereof, and has caused the arrest, upon warrant for an arrest of the said A. D. Baker, General Representative, and George E. Stillings, President of The National Mercantile Company, Limited, plaintiff herein, and C. H. Hune and O. Sundberg, Local Representatives of the plaintiff in Lane County, Oregon, all of which said arrests were made in the State of Oregon upon the complaint of the said Corporation Commissioner, R. A. Watson, and prosecuted to arrest by the District Attorneys in the respective counties in which the said arrests were made, all of which said arrests were made for soliciting applications for loans from the plaintiff in the manner herein previously set forth, and in violation of the terms of the said Act, being Chapter 341, General Laws of Oregon for 1913.

XXXIII.

That said defendant, R. A. Watson, has caused to be issued a number of copies of a bulletin, a copy of which said bulletin is hereto attached, marked Exhibit "B," and made a part hereof by reference thereto, in which said bulletin is set forth the names of the investment companies or corporations to which permits have been issued, and on which statement as appears there is not listed the plaintiff.

XXXIV.

That said defendant, R. A. Watson, has prepared for use a Preliminary Report, Sheet 1, and Preliminary Report, Sheet 2, copies of which said reports are hereto attached, marked Exhibits "C" and "D," and made a part hereof by reference thereto, in which bulletins he sets forth the requirements and provisions in said Act provided, as interpreted by the said Corporation Commissioner; that said blank forms are the blanks which said investment companies are required to fill and subscribe, and which plaintiff herein is required to fill and subscribe in order that it may secure a permit to do business in the State of Oregon from the said Corporation Commissioner on his approval.

XXXV.

That said defendant, R. A. Watson, has prepared for use application blanks and report blanks, a copy of which are hereto attached, marked Exhibits "E" and "F," respectively, and made a part hereto by reference thereto, in which are set forth the requirements of reports in said Act provided, as interpreted by the said

Commissioner; that such blank forms are the blanks which said brokers are required to make in order that, upon the defendant Watson's approval, they may carry on their business as in said Act provided.

XXXVI.

That said preliminary reports, Exhibits C and D, require that said investment companies furnish information which is unreasonable and not pertinent to the purposes for which said statement is required under the said Act, and substantially impossible to furnish.

(a) Said blank requires a statement of the consideration received for the stocks and bonds; whereas, as to the unissued preferred stocks and bonds of investment companies no consideration has yet been paid.

(b) It requires a true and complete list to be attached of the holders of the securities of the company, indicating the consideration which was given for the same; whereas, such list is constantly changing, and can not be truly and completely made, and many of the securities of an investment company are in the hands of persons and corporations without the knowledge of the investment company or broker.

(c) It requires a profit and loss statement, which is not in conformity with its books, and which can not be made in the manner required in the blank from the books of said company.

(d) It requires a true and correct statement of the receipts and disbursements for the past six or twelve months; whereas, such a statement would be cumbersome in the extreme, would convey no information to

said defendant pertinent to said purposes expressed in said Act.

(e) It requires a showing in full detail of the plan upon which the company is doing and intends to do business, and the purpose for which said securities are sold, and requires that there be made to the Corporation Commissioner the plan which the company has accepted for the sale of its stock.

(f) It requires that there be furnished, as an exhibit to said statement, true copies of all contracts, bonds or other securities it desires to sell or make with its contributors, together with a true copy of its subscription blank, and all other blanks used in connection therewith; whereas, in fact, said forms, contracts and bonds and other securities are constantly changing, and differing and varying contracts are sought to be made with its contributors.

(g) It requires copies of all literature for advertising matter used, or to be used, by such investment company, when in truth and in fact such literature or advertising matter is constantly changing, and it is not pertinent to the purposes of the Act that same should be exhibited to or made known to the Corporation Commissioner.

(h) It requires a list of the officers of said investment companies, together with their holdings of stocks and bonds, the actual cash invested in the company, their salaries per year, the estimated net worth of the officers and their time devoted to the company; whereas, the number of shares and bonds owned is a matter con-

fidential to said officers, which said company has no right to divulge, nor has said company accurate information with reference thereto, nor has the said company any way in which to determine the cash invested by said officers in said company, nor the estimated worth of said officers, and such information is not pertinent to the purposes of the Act, and beyond the power of the Corporation Commissioner to require.

(i) It requires that the investment company shall designate the prices and terms upon which its stocks, securities and bonds will be sold, and that the same shall not be sold at any other price or terms without the consent of the Commissioner; whereas, the prices and terms of sale of such securities are constantly changing, and all such information is not pertinent to the purposes of said Act, and beyond the power of the Commissioner to require.

(j) It requires a complete copy of each contract made, or which will be made, with any person, officer or agent, or other representative of such investment company, for the sale of its stocks, and a statement that there are no agreements, understandings or contracts, either verbal, written or implied, by which anyone has received, or is to receive, any cash, lands, securities or other compensation for the sale of its securities for its promotion, or for any causes except as specified in the application, and in the general exhibits attached, and that all the stock securities of the investment company will be sold or disposed of for cash, or its equivalent, as provided in the contracts or agreements stated in said application; whereas, the contracts made, or which will

be made, with the persons, officers, agents and representatives for the sale of its stocks are from time to time necessarily changing, and agreements are, of necessity, made by which parties may receive stock for promotion purposes other than as specified in the application, or for other purposes, and no such information is pertinent to the purposes of said Act, and beyond the power of the Corporation Commissioner to require.

XXXVII.

That by reason of the requirements of said Corporation Commissioner as to said statements which must be filed by said investment company before it can sell, or offer for sale, securities of said investment company in the State of Oregon, either by itself or through its representatives and agents, and before plaintiff herein can deliver any such securities, a property right of this plaintiff is invaded and destroyed, and its freedom to contract curtailed, impaired and destroyed, and it otherwise seriously damages the plaintiff in its business and property.

XXXVIII.

That the said defendant, R. A. Watson, Corporation Commissioner of Oregon, has likewise caused to be issued the so-called "Application of Stock Broker," a copy of which is hereto attached, marked Exhibit "E" and made a part hereof by reference thereto, and publicly declared that all dealers, (including agents and representatives of the plaintiff), in securities of investment companies must file such application, properly filled out before selling or offering for sale such securi-

ties in Oregon, or professing to engage or engaging in said business therein; that said blank requires that the agents and representatives of the plaintiff furnish information which is unreasonable and not pertinent to the purposes for which said statement is required.

(a) Said blank requires a detailed list of securities now held by such broker; whereas, such information is not pertinent and does not relate to the purpose for which the statement is required.

XXXIX.

That by reason of the enforcement of said law and requirements of the defendant, R. A. Watson, and requirements of said statements so to be filed, the plaintiff can not sell, or offer for sale within the State of Oregon, or take applications therefor, its contracts to make loans, nor can it fulfill the contracts to which it is now a party, and which have previously been placed in the State of Oregon, and the owners of the plaintiff's contracts are deprived of the right to assign the same over to others and to demand their fulfillment of the plaintiff.

XL.

That by reason of the heavy penalties in said Act set forth, the plaintiff and its agents and representatives in Oregon fear to take applications for such loans, in the manner hereinbefore set out, in Oregon, and the plaintiff is deprived of the right to conduct its business in the State of Oregon; that the right to take such applications for loans and enter into contracts therefor, in the manner hereinbefore set out, is a valuable right to the plaintiff, and of all other similar companies; that

to deny said companies the right to thus carry on their business in Oregon endangers their business, and threatens to cause said companies, and this plaintiff, serious damage and loss.

XLI.

That the present holders of the plaintiff's contracts acquired the same with a right to assign the same in Oregon and elsewhere, and free from any restrictions such as are imposed by said act, and such restrictions impair the said right, and damage the said owners and your plaintiff.

XLII.

The plaintiff charges that said Act, Chapter 341 General Laws of Oregon, 1913, is unconstitutional and void, and of no effect whatsoever, for the following reasons:

A. Said Act is in violation of Sec. 20 of Art. 4 of the Constitution of the State of Oregon, to-wit:

“Every Act shall embrace but one subject and matters properly connected therewith, which subject shall be expressed in the title; but if any subject shall be embraced in an Act which shall not be expressed in the title such shall be void only as to so much thereof as shall not be expressed in the title.”

The said Act embraces more than one subject, to-wit: It proposes to

(a) Regulate and supervise stock brokers and the business conducted by them;

(b) Regulate and supervise investment companies;

(c) Regulate and supervise the agents of the brokers and their business. It regulates and supervises the kind and nature of securities in which purchasers may invest. It purports to protect purchasers of stocks and bonds;

(d) It purports to define fraud, in the sale of stocks and bonds;

(e) It purports to create a Corporation Department.

The title of the Act does not express the full subject of the Act, inasmuch as the substance of the Act purports to define stock brokers and regulate their business, and the title to the Act does not mention stock brokers or their business; and,

The title to said Act does not express the regulation and supervision of the purchase and sale by individuals, corporations, or partnerships of securities of any kind or character.

B. The said Act is in violation of the Fourteenth Amendment of the Federal Constitution, which provides that no State shall make or enforce any laws which shall abridge the privileges and immunities of the citizens of the United States, nor shall any State deprive any person of life, liberty or property without due process of law, nor deny any person equal protection of the law in this:

(1) Since said Act is applicable, by the terms thereof to co-partnerships, but is not applicable to individuals not co-partners.

(2) Since said Act, by its terms, is applicable to state and national banks, but is not applicable to banks other than state or national.

(3) Since said Act, by its terms, is not made applicable to building and loan associations, but is applicable to other corporations incorporated to own, improve and deal in real property.

(4) Since said Act, by its terms, is not applicable to mortgages upon real property situated within this State, where the entire mortgage is sold and transferred with the note secured by the mortgage, but is not applicable to mortgages upon real property situated within this State if the said mortgage secures bonds, or the entire mortgage is sold with all said bonds.

(5) Since said Act, by its terms, is applicable to stocks, bonds and other securities, but is not applicable to commercial paper or other evidence of indebtedness.

(6) Since the said Act, by its terms, is made applicable to the stocks of any of said investment companies, as defined in said Act, when the stocks are sold by said investment companies or by their agents, but is not made applicable to the stocks of said investment companies when the same are issued to original subscribers thereto.

(7) Since the said Act, by its terms, is made applicable to the stocks of investment companies, as defined in said Act, when the said stocks are sold by said companies, or by agents thereof, but is not made applicable to their stockholders upon the declaration of stock dividends, so-called.

(8) Since said Act is made applicable to investment companies, as defined in said Act, when said investment companies sell, or offer for sale, an entire issue of its said bonds, stocks or other securities, when such sale or offer for sale is not made in the course of continuous and successive transactions that are of a similar nature; but said Act is not made applicable to the sale of such stocks, bonds, or other securities by the owner thereof when he sells such securities owned by him when such sale is not made in the course of continuous and successive transactions of a similar nature.

(9) Since said Act is made applicable to anyone who sells for a compensation or on commission, but is not made applicable to anyone who does not sell for a compensation or commission.

(10) Since said Act is applicable to co-partnerships and individuals acting as stock brokers or companies, but is not applicable to individuals or co-partnerships acting as private banks or bankers; and, by the express terms of said Act any individual or co-partnership acting as a private bank or a private banker is exempt from the terms and provisions of said Act.

(11) Since said Act, by its terms, is applicable to stocks, bonds and securities when in the hands of individuals or co-partnerships, or investment companies such as the plaintiff, but is not applicable to such stocks, bonds or securities when in the hands of banks, state, national or private.

(12) Since said Act is applicable to the stock of any said investment company, as defined in said Act,

when said stock, bonds or securities are so owned by another investment company, stock broker or agent, but is not applicable to the stock of such investment company when the same is issued to an original subscriber.

(13) Since said Act is made applicable to investment companies, stock brokers and individuals therein defined dealing in stocks, bonds and securities, but is not applicable to one who in a judicial sale or as an administrator or executor or trustee sells and offers for sale such bonds, stocks or securities.

C. That said Act is unconstitutional and void since it is in violation of Sec. 8 of Art. 1 of the Constitution of the United States, and of the Fourteenth Amendment of said Constitution of the United States, in that said Act imposes a burden upon interstate commerce in the following particulars:

(1) Said Act forbids the sale, or attempt to sell, of any bonds, stocks or other securities of any investment company, as defined in said Act, until the company shall have filed with the Oregon Corporation Commissioner the statement and information required by said Act, and shall have otherwise conformed to said Act, and secured from said Corporation Commissioner the permit therein required.

(2) Since the said Act prohibits the sale of stocks, bonds and other securities of said investment companies in the State of Oregon unless said investment companies shall in all respects conform to the requirements of said Act.

(3) Said Act forbids the sale, or offer for sale, of

the stocks, bonds and other securities of said investment companies, as defined in the Act, until such investment companies, though they be co-partnerships organized under the laws of another state or country, and not organized under the laws of the State of Oregon, shall have filed with the said Oregon Corporation Commissioner the report and information required by said agent and by said Commissioner, paid the fees in such Act prescribed and otherwise conformed thereto.

(4) Said Act compels any person, firm, co-partnership, corporation or association not a resident of the State of Oregon, who shall there sell, or offer for sale, any securities of any investment company covered by said Act, or who shall, by advertisement or otherwise, profess or engage in the business of selling or offering for sale such securities, to make report to said Corporation Commissioner and pay certain fees. It forbids such persons, firms, corporations, co-partnerships or associations, under heavy penalties, from selling securities until they shall have in all respects complied with the said law. It also forbids such sale, or offer for sale, within the State of Oregon, whether the same be interstate or intrastate commerce.

(5) Said Act prohibits any company, stock broker or agent to issue, circulate or deliver any advertisement, pamphlet, circular or other document in regard to any stock, bonds or other securities in the State of Oregon until after such investment company or stock broker shall have been licensed to sell such securities in the State of Oregon, and until such company, stock broker or agent shall have submitted such advertisement,

pamphlet, circular or other document to the Corporation Commissioner and have secured his approval thereof.

In this respect, your petitioner charges that stocks, bonds and other securities issued by said investment companies, and especially the applications for loans and contracts for loans, and mortgages upon real property handled by the plaintiff, are legitimate articles of commerce, and that dealing therein is interstate commerce, and not subject to regulation by the State of Oregon in any way whatsoever, and that the sale thereof by said investment companies and the taking of such applications and the making of such contracts and the making of such loans by the plaintiff to residents of the State of Oregon, and to be consummated in the State of Oregon, and payment therefor to be made in other states and countries is interstate commerce, and the burdens and restrictions imposed upon such transactions are burdens upon interstate commerce, and render such Act unconstitutional and void.

D. That the said Act is likewise unconstitutional and void, and in violation of the Fourteenth Amendment of the Constitution of the United States, since by its said provisions and regulations it deprives any such investment company and other persons similarly situated of its property without due process of law, and denies said investment companies and other persons similarly situated the equal protections of the laws, and denies to said investment companies, and others, freedom to contract guaranteed by said Constitution.

(1) In that said Act denies the right to any investment company, defined in the said Act, of doing business, or selling or disposing of its stocks, bonds or other securities, unless said investment company is solvent, irrespective of the price at which said securities should be sold or the value thereof.

(2) That it denies to any investment company, as herein defined, the right to sell, and to any person the right to purchase of any such investment company, any of its stocks, bonds or other securities, if the Corporation Commissioner at any time should decide that such stocks, bonds or securities are not good, legitimate investments; and denies to any investment company, as herein defined, the right to sell and to any person the right to purchase of any such investment company any of its stocks, bonds or other securities, if the Corporation Commissioner finds that the Articles of incorporation or association, charter, constitution, by-laws, plan of business or proposed contract of such investment company contains any provision that is unsafe, unfair, unjust, inequitable or oppressive to any class of contributors or customers, or if he decides that such investment company is not solvent or does not intend to do a fair and honest business.

E. That said Act is likewise unconstitutional and void, and in violation of Section 10 of Article 1 of the Constitution of the State of Oregon, and of the Fourteenth Amendment to the Constitution of the United States, since it does deprive the plaintiff, and other persons similarly situated, of their property without due

process of law, inasmuch as the provisions and conditions prescribed by the Act are not within any power of the State of Oregon to impose, and are not within the police power of the State in this respect:

(1) That the provisions and conditions imposed by said Act are not necessary to protect the health, safety, morals and essential welfare of the people of the State of Oregon.

(2) That such conditions and provisions as are imposed by said Act are not reasonable to protect the health, safety, morals and essential welfare of said people of the State of Oregon, since such provisions and regulations are imposed upon the business of selling securities of every kind as are described in said Act, and will seriously impair business and commerce, and seriously interfere with business and commerce of every kind whatsoever, by preventing the free purchase of said securities and the free investment in the stocks and bonds and securities covered by the Act.

(3) In that said Act regulates and restricts the rights of stock brokers, in that it provides that no stock broker shall sell or offer for sale any stocks, bonds or other securities listed by and belonging to investment companies unless the stock broker shall fully comply with the terms of said Act.

F. That said Act is likewise unconstitutional and void, and violation of Section 20, Article 1 of the Constitution of the State of Oregon, and the Fourteenth Amendment of the Constitution of the United States.

(1) Since it purports to regulate and restrict the rights of the corporations, co-partnerships, associations, persons and firms who by said Act are defined as stock brokers, and the plaintiff and its representatives in Oregon, and all such brokers, and provides that the said brokers shall not sell, nor offer for sale any securities, nor profess the business of selling or offer for sale any securities covered by the Act, unless such stock broker shall have otherwise complied with the requirements of said Act; that, insofar as the said Act attempts to classify and define said stock brokers in said securities, it is unconstitutional and void, inasmuch as it denies to said stock broker, as therein defined, the equal protection of the law, and in defining and classing those who sell or offer for sale any of the stocks, bonds or other securities issued by investment companies, as defined by the Act, said classification is unreasonable, invalid and void.

(2) Since said Act purports to prohibit plaintiff and others similarly situated from selling or offering for sale any stocks, bonds or other securities covered by said Act, unless plaintiff shall furnish the said corporation commissioner with a statement as to their names, addresses, the general character of the securities to be dealt in, the place of their office in Oregon, and shall furnish evidence establishing the sound moral character and good business repute of the person so applying, and for what length of time and in what capacities he has been engaged in the sale of securities, also a statement of the assets and liabilities of all persons interested as principals, officers, directors and managing or sales agents of such stock broker and such additional

information as the Commissioner may deem necessary.

G. Said Act is likewise unconstitutional and void, and in violation of the Constitution of the State of Oregon and of the Constitution of the United States in that the powers and duties conferred upon the said Oregon Corporation Commissioner include the delegation of legislative power to said Commissioner. Said Act confers upon said Commissioner the power to determine whether such investment company is solvent, and whether its articles of incorporation or association, its constitution and by-laws, its proposed plan of business and proposed contracts contain and provide for a safe, fair, just and equitable plan for the transaction of business, and to determine whether such articles of incorporation or association, charter, constitution and by-laws, plan of business or proposed contract contain any provision that is unsafe, unfair, unjust, inequitable or oppressive to any class of contributors or customers, and to determine whether the said investment company intends to do a fair and honest business.

That the said Act in no respect determines the standard of what is or is not a safe, fair, just and equitable plan of business and contract, and what is a solvent investment company, and what is an unsafe, unfair, unjust or inequitable plan of business or proposed contract, and what plan of business or proposed contract is oppressive to any class of contributors or customers, and by what standard the said Commissioner shall determine what investment companies are solvent and do not intend to do a fair and honest business.

That said Act confers upon the Corporation Commissioner the power to determine as to whether or not the stocks, bonds or other securities proposed to be sold and purchased by stock brokers and investment companies, as defined in said Act, are a good and legitimate investment.

That said Act in no respect defines the standard of what is or what is not a good, legitimate investment, and in no respect defines what would be the nature and character of securities which would be a good, legitimate investment.

Insofar as said Act does not define the standard by which said plan of business and securities are in this respect to be adjusted, it is a delegation of legislative power, and therefore void.

H. That said act is likewise unconstitutional and void, and in violation of Section 21 of Article I of the Constitution of the State of Oregon.

(1) In that when a state issues a charter or a certificate of incorporation, the same constitutes a contract between the corporation and the state, and between the stockholders of the corporation and the state. Such a contract cannot be impaired or altered without the consent of the stockholders of the corporation, unless the power and authority to do so is reserved in the charter or in the constitution or general laws of the state. Especially is this true in regard to corporations created and organized since 1906 in the State of Oregon.

(2) Said Act purports to apply to corporations organized both before and after said Act was passed,

but contains no provision for creation or organization of the corporations organized now as well as those organized before the Act, or grants full corporate powers in accordance with their respective articles of incorporation. The same are accepted, and the corporation is fully organized before the said Act becomes applicable. The law then attempts to vest the Corporation Commissioner with authority to compel the corporation to adopt a plan of business in accordance with his views on what is proper, safe and equitable in the exercise of its corporate powers and business; if such compliance is not made, the said corporation cannot do business in the State of Oregon.

I. That the said Act is likewise unconstitutional and void, and in violation of the Constitution of the United States and of the State of Oregon, inasmuch as it confers upon the said Oregon Corporation Commissioner the authority and power to determine what is good, legitimate investments, and confers upon the said Oregon Corporation Commissioner the authority and power to determine when an investment company is solvent, and when its articles of incorporation or association or constitution and by-laws, its proposed plan of business and proposed contract contain and provide for a safe, fair, just and equitable plan for the transaction of business, and also when the articles of incorporation or association, charter, constitution and by-laws, plan of business or proposed contract contain any provision that is unsafe, unfair, unjust, inequitable or oppressive to any class of contributors or customers, and also when such company is not solvent, and does not intend to

do a fair and honest business. That thereby it confers upon said Commissioner judicial authority; that said Commissioner is not a judicial body within the provisions of the Constitution of the State of Oregon and of the United States, and the delegation thereto of judicial power to determine the questions as above set forth is in violation of said Constitution, and the said Act, therefore, is void.

J. That the said Act is likewise unconstitutional and void, and in violation of the Fourteenth Amendment of the Constitution of the United States, and Sec. 18, Art. 1 of the Constitution of the State of Oregon, in that it denies to the plaintiff, and to other companies similarly situated, a partnership made by the terms, subject thereto and hereto, a judicial investigation, by due process of law, of the facts as to whether the securities mentioned in the Act handled by stock brokers are good, legitimate investments, and as to whether such companies as the Act terms investment companies are solvent, and as to whether the articles of incorporation, constitution and by-laws of such companies, their proposed plan of business and proposed contracts contain and provide for a safe, fair, just and equitable plan for the transaction of business, and as to whether such articles of incorporation or association, charter, constitution and by-laws, plan of business or proposed contract contain any provision that is unsafe, unfair, unjust, inequitable or oppressive to any class of contributors or customers, and as to whether such investment company is solvent and intends to do a fair and honest business.

That said Act is likewise unconstitutional and void

in that it denies the due process of law guaranteed by the Constitution of the United States to plaintiff herein, and to all others similarly situated, in that the determination of the said Commissioner upon the matters just previously stated are not subject to review by judicial process, or upon appeal from such finding and decision of the Commissioner, except that the said Act provides, in Sec. 14 thereof, that an appeal may be taken from the decision of the said Commissioner refusing to grant a charter or certificate of authority to any stock broker or investment company to the Circuit Court of the State of Oregon for Marion County, and that such appeal shall be limited to a consideration of whether there has been an abuse of discretion on the part of the Commissioner in making such decision, and such appeal shall be tried and determined by the Court in a summary way, but otherwise as a suit in equity.

And the said Act, in effect, provides that the Commissioner shall conclusively determine the questions of fact which shall be submitted to him in the course of investigation of the said plan of business of said investment companies, or of their securities, and said Act does not provide for an appeal for judicial review with respect to said questions in any manner whatsoever, except as to abuse of discretion on the part of the said Commissioner.

K. That said Act is likewise unconstitutional and void, and in violation of the Fourteenth Amendment of the Constitution of the United States, in that it deprives said investment companies, your plaintiff, and others

similarly situated, of liberty and property without due process of law, and denies to plaintiff, and others, equal protection of the law, since said Act provides that said defendants and the Oregon Corporation Commissioner, his clerks, accountants and examiners, may examine the business of said investment companies and brokers and their accounts, may require them to divulge any and all facts in connection with their business, and whether or not the same relates in any way to the securities proposed to be sold in Oregon.

The said defendants have announced what facts and information in connection with said businesses the said Commissioner would require in the preliminary statement upon which the securities of such investment companies will or will not be listed by the said Commissioner; and that said Act does further provide that all such information obtained by said Commissioner, and all the records of the Commissioner in regard thereto shall be open to examination of the public.

And the plaintiff shows that the information as to the said businesses of said investment companies, its contracts with its employees and with others, its knowledge as to methods by which it transacts its affairs, its knowledge as to credits of its customers, its general information as to the condition of its business, the prices and costs of carrying on its business, each and all are property rights of value to said investment company, and the publication of information thereto, as to said investment company's business deprives it of valuable property rights, seriously damages it in its business, and will otherwise cause it damage and loss.

L. That said Act is likewise unconstitutional and void, in that it subjects plaintiff herein, and others similarly situated, to cruel, unusual and vindictive punishment, in violation of Sec. 15 of Art. 1 of the Constitution of the State of Oregon, in that it prescribes a penalty for the sale or offer for sale of any stocks, bonds or other securities of investment companies unless said companies shall comply with the restrictions of the Act, and unless plaintiff shall have registered with the Corporation Commissioner as prescribed and provided, and provides that the said violation of the Act in that respect shall be a felony, and any person who has so violated said Act shall, upon conviction thereof, be fined not more than Ten Thousand Dollars, or imprisonment in the State prison for not more than ten years, or both, and any intention to defraud any purchaser of stocks, bonds or other securities, or any intention to wilfully violate said Act is not required to make said violation a felony.

That any person who shall knowingly and wilfully make or cause to be made any false statement or false entries in the books of the company shall likewise be guilty of a felony; and any person who shall exhibit any false papers with the intention of or for the purpose of deceiving any person authorized to investigate said investment company's affairs, or who shall make any false statements relative to securities of the same, shall likewise be guilty of felony, and, upon conviction thereof, shall be fined not more than Ten Thousand Dollars or imprisonment in the State prison for not more than ten years, or both.

M. That said Act is likewise unconstitutional and void, since it prescribes extraordinary, unusual and vindictive punishment and penalties for a violation thereof, and provides penalty of fine and imprisonment in the State prison for the sale, or mere offer for sale of any of the securities covered by said Act, and provides other penalties, fines and imprisonment, all of which are so extreme and cumulative that they prevent any person, firm or corporation, as described in said Act, or a stock broker or agent as therein described, from challenging the validity of the provisions of said Act, rather than to take the chance of the penalty imposed; that, therefore, said Act, in that respect, deprives said investment companies, as your plaintiff, and others similarly situated, of the equal protection of the law guaranteed to it by the Constitution of the United States.

XLIII.

Plaintiff alleges that it is its desire and right to offer said securities in the State of Oregon, and to make application for loans, and issue such contracts therefor as have been herein previously described, by itself and through its agents and brokers, and that it is the avowed purpose of the defendants herein to prevent the plaintiff from thus conducting its business, unless the plaintiff and other corporations, individuals and others similarly situated shall have complied in all respects with the terms of said Act and the terms of the defendant Watson.

XLIV.

That immediate and irreparable injury will be

caused to the plaintiff by reason of the enforcement of said Act, and particularly by reason of the fact that the plaintiff, its agents, employees and brokers will be prevented by said Act from transacting their said business, from selling said securities in Oregon, from taking applications for such loans, and from making and entering into such contracts and making such loans except in compliance with said Act and meeting with the terms of the defendant Watson.

XLV.

That to prevent the immediate and irreparable injury and the continuing wrong which will necessarily arise by the enforcement of said Act, and as to the requirements as to such enforcement made by said defendants and the Oregon Corporation Commissioner, and to prevent a multiplicity of suits against said investment companies and this plaintiff, and to prevent a further criminal prosecution by the said agents and officers of the defendants, which have been hereinbefore previously described, of the plaintiff, its agents, employees and stock brokers in the securities, contracts and applications filled in by the plaintiff; and to prevent further prosecution, under said Act and the imposition of the heavy penalties described by the Act; and to prevent an immediate and irreparable injury which will be caused to the plaintiff by reason of the fact that they are prevented from taking applications for loans, entering into contracts for loans, and intending borrowers from making such applications and entering into such contracts, and to prevent the immediate and irreparable injury to the plaintiff and to such intending borrowers,

a writ of injunction is necessary to restrain the defendants from interfering with the plaintiff and other persons similarly situated, and agents and employees of the plaintiff, and stock brokers dealing in the plaintiff's securities, and any and all persons owners of such contracts who may desire to dispose of the same in a manner not permitted by said Act.

XLVI.

That the value of the matters here in dispute, the loss of which the plaintiff is sustaining and will sustain by the enforcement of said Act, and the damage to plaintiff's business, as hereinbefore set out, will be greatly to exceed the sum of Three Thousand (\$3000.00) Dollars.

XLVII.

That all the matters and things herein contained are contrary to equity and good conscience, and tend to the manifest injury and oppression of the plaintiff and its agents; and, inasmuch as the plaintiff and its agents, and others similarly situated in the State of Oregon, and each of them, have no adequate remedy in the premises by the strict rules of the common law, and can obtain relief only in a court of equity where matters and things of the kind and character hereinbefore stated are properly cognizable and relievable; and to the end that they, and each of them, may have suitable and adequate relief, which plaintiff can obtain only in a court of equity, and by reason of the federal issues involved relative to the civil rights of the plaintiff, guaranteed to it under the Constitution of the United States, re-

straining it and its agents of their liberty and taking its property and the property of its agents without due process of law, and impairing the obligation of said contracts, and the contracts of its agents, and interfering with interstate commerce; and to the end, therefore, that these defendants, and each of them, may, if they can, show why the plaintiff should not have the relief herein and hereby prayed for, and may have full, true, direct and perfect answer made to all and singular the matters herein set forth, as if particularly interrogated thereunder, but not under oath, their oaths to such answer or answers being hereby expressly waived, the plaintiff prays as follows:

1. To the end that said Act No. 341 of General Laws of Oregon, 1913, of the Legislature of Oregon, may be decreed to be unconstitutional and void and of no effect whatsoever.

2. And to the end that the plaintiff and its agents, employees, brokers and dealers in its said applications for loans, contracts for loans and mortgages, as herein-before described, may be decreed to have the right to take such applications, make such contracts and make such mortgage loans, and sell the same without compliance in any way whatsoever with the regulations and restrictions of said Act set forth.

3. And your plaintiff, and its agents and employees and those who make such applications to it, and enter into such contracts with it, and make such mortgages to it, and those others who may deal in its said contracts and mortgages may be secured against unlawful and illegal trespasses and arrests by reason of any

alleged violation of said Act, and that the said R. A. Watson, the said Corporation Commissioner, his agents and employees of said Corporation Department may be perpetually and forever restrained by the order and injunction of this Court from

(a) Enforcing and attempting to enforce any provisions of the said Act No. 341 of the General Laws of Oregon 1913;

(b) From hindering in any way whatsoever the taking of applications for loans, making of contracts for loans, or taking of mortgages, and in the manner in which plaintiff conducts its business, whether such applications be taken by the plaintiff or by its agents or employees, and whether such contracts and mortgages be handled by the plaintiff or by its employees.

(c) From beginning any action of any nature whatsoever against the plaintiff, its agents and employees, or against any other person to prevent or hinder in any way the conduct of the business of the plaintiff, as before described.

(d) From publishing any information as to the plaintiff, the applications for loans and contracts so dealt in by the plaintiff.

(e) From arresting or causing the arrest of the plaintiff or any agent or employee of the plaintiff, or any person who may within the State of Oregon take such applications for loans, entering into contract for them, or make to the plaintiff a mortgage as security for such loan, or assign such application or mortgage; and that the said defendants, and each and all of them,

may, in the meantime, be restrained during the pendency of this suit, and that the plaintiff have such other and further relief as may be agreeable to equity and good conscience.

And may it please this Court to grant unto the plaintiff not only a writ of injunction, conformable to the prayers of this bill, to be issued to the above named defendants, but also a writ of subpoena to be issued out of and under the seal of this Honorable Court, to be directed to said defendants, commanding that at a certain time, and under a certain penalty, to be therein specified, to be and appear before this Honorable Court, then and there to answer the premises, but not under oath, answering under oath being expressly waived, and to abide by the order and decree of the Court herein, and that said defendants may appear herein according to law.

THE NATIONAL MERCANTILE CO., LTD.

George E. Stillings,

(Seal of National)

President.

(Mercantile Co.)

WILSON, NEAL & ROSSMAN,

Solicitors for Plaintiff.

Exhibit 1.

SPECIMEN COPY

**INCORPORATED IN THE DOMINION OF
CANADA, UNDER THE LAWS OF THE
PROVINCE OF BRITISH COLUMBIA
CANADA**

No. R R

Issue 1

Series R N

THE NATIONAL MERCANTILE COMPANY
LIMITED

Home Office, Winch Building

MUTUAL

Vancouver, B. C.

PLAN

"A NATIONAL LOAN, SAVINGS AND IN-
VESTMENT SOCIETY"

*Subject to "Trust Companies Regulation Act" Requir-
ing Quarterly Reports to Be Made to the Gov-
ernment by Chartered Accountants*

THREE PER CENT LOAN AND HOME PUR-
CHASING CONTRACT.

This Contract is One of a Series of Like Contracts,
Embracing All the Contracts of This Series and
All of the Contracts Previously Written or
Underwritten Herein, and Described by
Same Issue and Series, Number Above.

Face Value \$1500.00

IN CONSIDERATION of
the written and printed application for this 3% LOAN
AND HOME PURCHASING CONTRACT,
hereby made a part of this contract and in considera-
tion of the initial payment of \$15.00 and further pay-
ment thereafter of a monthly instalment of \$15.00 on
or before the fifteenth day of each succeeding month,
THE NATIONAL MERCANTILE COMPANY,
LIMITED

issues this Contract to JOHN DOE, Esq., 1000 Gran-
ville Street, Vancouver, B. C., Canada.....
.....
and to his or her legal heirs or assigns, upon the follow-

ing Terms and Conditions, and subject to the Benefits, Provisions and Requirements printed on the back hereof, which are hereby referred to and made a part of this Contract as fully as if recited here.

IT IS HEREBY AGREED, that the prompt payment of the monthly instalments as herein provided for five consecutive months shall render the holder hereof eligible to receive a Loan, or Funds with which to make an Investment or to purchase a home in the sum of the "Face Value" of this Contract in the order of his application therefor out of the Loan and Reserve Fund of the particular series to which this Contract belongs, such Loan to be granted or Funds supplied when accumulated therefor in accordance with the Provisions hereof, and if accumulated prior to Ten per cent. (10 per cent.) of the "Face Value" of the Contract having been paid hereon in monthly instalments, the holder is entitled, at his or her election, to advance the difference required to make up the amount of ten per cent. (10 per cent.) aforesaid, and as required and provided for in paragraph two (2) under Terms and Conditions under which the Loan and Reserve Funds are loaned.

ISSUED at the Home Office of
the Company, in the City of Van-
(SEAL) couver, British Columbia, Canada,
this First day of August, 1913.

G. E. Stillings,

President.

Secretary.

SPECIMEN COPY.

TERMS AND CONDITIONS

Referred to in this Contract and in the application there-

for and made a part of this Contract. The Owner of this Contract is hereinafter referred to as the "holder," and THE NATIONAL MERCANTILE COMPANY, LIMITED, is referred to as the "Company."

SECTION 1.

THE NATIONAL MERCANTILE COMPANY, LIMITED, hereby covenants and agrees that there shall be maintained by the Company a Loan and Reserve Fund for this Contract that shall include all of the instalment payments collected hereon, including the initial payment, as set out and provided for in Section twenty-three (23) herein, less the actual legitimate expenses of the Company; the same to be loaned or invested in approved securities by the Board of Directors of the Company, and this Loan and Reserve Fund, together with profits to its credit, shall be used as a fund to pay this Contract when it shall become due.

SECTION 2.

The Loan and Reserve Fund of each particular series shall be kept separate and shall be derived from all of the instalments collected on each Contract and other sources as provided for in Section One (1), Eight (8) and Twenty-three (23) herein, together with the return payments of any sums thereof loaned, and its earnings shall be the amounts gained from simple and compound interest on money loaned, delinquencies, cash surrenders, paid-up certificates, profits on loans sold at a bonus, investments and fees, and any other surplus ac-

cretions thereof, including any necessary apportion of surplus funds made by the Company to this Contract.

SECTION 3.

After the initial and five instalments shall have been paid on this Contract and it has been in force for six consecutive months, the holder shall be entitled to surrender this Contract to the Company and receive therefor a paid up, non-assessable, non-forfeitable, non-participating Contract bearing the date of surrender, for seventy-five per cent (75 per cent) of the amount contributed by him to the Loan and Reserve Fund out of instalments, together with interest thereon at the rate of one per cent (1 per cent) per annum for the average time, said paid-up Contract shall become due and payable when it is the oldest outstanding unpaid contract in the series to which it belongs. Such paid up contract to be payable when accumulated for, and to bear interest at the rate of three per cent (3 per cent) per annum, as shown in the Table of Values, column four (4), endorsed upon the back of this Contract and hereby made a part thereof.

SECTION 4.

After the initial and eleven instalments shall have been paid on this Contract, and it has been in force for twelve consecutive months, the holder shall be entitled to surrender this Contract and receive therefor a paid-up, non-assessable, non-forfeitable, non-participating Contract bearing the date of surrender for the entire amount contributed by the holder to the Loan and Reserve Fund out of instalments, together with interest

thereon 'at the rate of one and one-half per cent ($1\frac{1}{2}$ per cent) per annum for average time, said paid-up Contract shall become due and payable when it is the oldest outstanding unpaid contract in the series to which it belongs. Such paid-up contract to be payable when accumulated for, and to bear interest at the rate of three per cent. (3 per cent) per annum, as shown in the Table of Values, column four (4), endorsed upon the back of this contract and hereby made a part thereof.

SECTION 5.

After the initial and seventeen instalments shall have been paid on this Contract, and it has been in force for eighteen consecutive months, the holder shall be entitled to surrender this Contract and receive therefor a paid-up, non-assessable, non-forfeitable, non-participating Contract, bearing the date of surrender for the entire amount contributed by the holder to the Loan and Reserve Fund out of instalments, together with interest thereon at the rate of two per cent. (2 per cent.) per annum for average time, said paid-up Contract shall become due and payable when it is the oldest outstanding unpaid contract in the series to which it belongs. Such paid up Contract to be payable when accumulated for, and to bear interest at the rate of three per cent (3 per cent.) per annum, as shown in the Table of Values, column four (4) endorsed upon the back of this contract and hereby made a part thereof.

SECTION 6.

After the initial and twenty-three monthly instalments shall have been paid on this Contract, and it has

been in force for twenty-four consecutive months, the holder shall be entitled to surrender this Contract and receive therefor in cash the entire amount contributed by the holder to the Loan and Reserve Fund out of instalments, together with interest thereon at the rate of two and one-half per cent. ($2\frac{1}{2}$ per cent.) per annum for average time, subject to all the provisions of section seven (7) herein, or in lieu thereof the holder may receive a paid-up, non-assessable, non-forfeitable, non-participating Contract, bearing the date of surrender for the full amount of all instalments paid by the holder on this Contract, together with interest thereon at the rate of three per cent. (3 per cent.) for average time, said paid-up Contract shall become due and payable when it is the oldest outstanding unpaid contract in the series to which it belongs. Such paid up Contract to be payable when accumulated for, and to bear interest at the rate of three per cent. (3 per cent.) per annum, as shown in the Table of Values, column four (4) endorsed upon the back of this contract and hereby made a part thereof.

SECTION 7.

In lieu of benefits provided for in sections three (3), four (4), five (5) and six (6) of this Contract, the initial and seven monthly payments having been paid, the holder thereof by giving thirty (30) days' notice in writing to the Company and assigning this Contract as sole security, and executing a Note in favor of the Company, may borrow not more than fifty per cent. (50 per cent.) of the monthly instalments contributed by the holder to the Loan and Reserve Fund of this Contract with interest at the rate of five per cent. (5 per cent.) per

annum, and subject to the right of the Company to enforce any prior liens as provided in section eighteen (18) hereof, the holder of this Contract waives all right and title to any and all benefits, provisions or loans accruing hereunder, while this Contract is assigned as security for a temporary loan; provided further that not more than fifty per cent. (50 per cent.) of the amount accumulated in the Loan and Reserve Fund in any one month in the particular series to which this Contract belongs shall be used in making temporary collateral loans, paying cash surrenders, or for settlement of death claims.

SECTION 8.

The settlements and benefits of this Contract under and according to Sections one (1), two (2), three (3), four (4), five (5), six (6), seven (7) and thirteen (13) and this contract as a whole, are calculated upon the basis that not less than eighty per cent. (80 per cent.) of the instalments collected hereon, after the initial payment and three monthly instalments have been paid, shall be placed in the Loan and Reserve Fund of the particular series to which this contract belongs, and should the amount in the Loan and Reserve Fund be insufficient to satisfy this contract at the time it is due, under the terms of the aforesaid sections and the terms of the contract, the Company reserves the right to apportion from any of its surplus or expense funds an amount necessary to satisfy this contract under and according to all of its terms and conditions.

SECTION 9.

Should the holder of this Contract not desire a loan,

when the loan is ready under the terms hereof, the holder may within thirty (30) days from the date upon which notice to this effect is given him or her by the Company, surrender this Contract to the Company, and receive therefor, on each One Thousand Dollars (\$1,000) "Face Value" thereof all the monies paid by the holder on this Contract, and in addition thereto the holder shall be paid a premium of One Hundred and Fifty Dollars (\$150). Contracts of "Face Value" of smaller or larger denomination will be paid in same proportion.

SECTION 10.

Should the holder of this Contract prior to the fifth monthly instalment as provided for under Section three (3) hereof fail to pay any of the monthly instalments when due, for two consecutive months after they become due, and the holder hereof does not avail himself of the privileges guaranteed the holder in Section eleven (11) herein, then this Contract shall, at the option of the Company, be wholly null and void and of no effect, and shall be cancelled on the books of the Company for non-payment of monthly instalments due hereon, and all payments made hereon shall be forfeited, and the aggregate amounts of such payments shall be retained by the Company as agreed liquidated damages for the non-performance of the terms and conditions of the application therefor, and of the terms and conditions of this Contract, by the holder, time, manner, and amount of payment being of the essence of this Contract.

SECTION 11.

If the holder before or after a loan has been granted,

on account of sickness or misfortune, becomes unable for either of these reasons to pay the monthly instalments, and so notifies the Company in writing of said sickness or misfortune before the Contract is in arrears, a suspension of the aforesaid instalments, for a reasonable length of time, will be allowed the holder, but not to exceed a period of six months. At the expiry of the suspension the holder may make written application for suspension for a further period of six months and shall supply full information as to his financial position, and the Directors shall decide whether or not to grant the extension applied for. Upon or before the expiry of the suspension and before a loan has been made the Company will issue a new contract upon application, of date applied for to the Holder hereof giving credit thereon for all monies paid hereon. Should this Contract become null and void for the non-payment of the monthly instalments as provided for under Section ten (10) herein, the initial payment and all monthly instalments paid previous to and including the fifth monthly instalment shall be allowed as a credit on a new Contract for a like amount, provided the owner hereof, within five years from the date of such cancellation, applies for said new Contract for a like amount and pays two monthly instalments in advance.

SECTION 12.

DEATH CLAUSE.

Should the holder of this Contract die while this Contract is in good standing, and before this Contract has been surrendered, assigned, transferred, or any loan

made hereon, the Company, upon satisfactory proof of death being submitted in writing within sixty (60) days thereafter, shall render this Contract eligible for a loan of the "Face Value" hereof, said loan to be available to the legal representatives of the deceased holder, upon the same terms and conditions as set out herein, and said death of the holder hereof shall give this Contract priority for receiving a loan over that of all other applicants for loans of this series of Contracts, excepting other Contract holders of this series who may have filed applications for loans prior to the holder hereof, on account of death. Or should the holder die, and should his or her legal representatives not desire to avail themselves of any of the privileges herein extended, the Company will, upon request, waive the conditions of this Contract, and upon the surrender of the same, assigned to the Company by the legal representatives of the deceased holder, upon receipt of satisfactory proof of the death of the holder submitted in writing within sixty (60) days after said death occurs, pay to the said legal representatives the full amount of all monies paid hereon, with interest at the rate of five per cent. (5 per cent.) per annum for average time, that the said monies have been accumulating, and subject to all the provisions of section seven (7) herein.

SECTION 13.

The monthly instalments required to be paid on this Contract as agreed to in the application therefor must be paid for ninety-nine consecutive months, beginning within thirty (30) days from the date of said application, unless surrendered on account of a loan having been

made to the holder or surrendered for a paid-up Contract or for cash, as provided for in Sections three (3), four (4), five (5), six (6) and nine (9) of this Contract, or transferred as provided in section seventeen (17) herein, or unless surrendered in the event of the death of the holder, as provided for in section twelve (12) herein.

SECTION 14.

It is hereby agreed that each monthly instalment having been paid as herein provided, and as agreed to in the application thereof, for ninety-nine consecutive months, shall render this Contract paid up in full and no further payments shall be required, and the Company promises and agrees to pay to the registered holder hereof, or his or her legal heirs or assigns, one hundred and twenty months from the date of this contract seventeen hundred and twenty-five (\$1725.00) dollars, together with such equitable proportion of the surplus accrued from delinquencies, cash surrenders, paid-up certificates, investments and fees, and all other surplus accretions as set out herein, from all the Contracts in the particular series to which this Contract belongs, and as may be apportioned to this Contract by the Board of Directors of the Company, which amount shall not exceed twenty-two hundred and fifty (\$2250) dollars and shall be paid out of the Loan and Reserve Fund, as soon as the amount on hand to the credit of this Contract shall equal the maturity value hereof; or the holder may at such time accept in cash in full settlement for this Contract the amount in the Loan and Reserve Fund standing or placed to the credit hereof, as soon as accumulated,

which amount shall not be less than the guaranteed minimum value as shown in column seven (7) of the Table of Values, or the holder may accept in cash in full settlement hereof the full amount standing to the credit of this Contract in the Loan and Reserve Fund of the series to which this Contract belongs.

SPECIMEN COPY.

SECTION 15.

Monthly instalments provided for in this Contract are due and payable at the Home Office of the Company without notice on or before the fifteenth day of each month following the date of the application therefor, but will be accepted elsewhere when paid in exchange for the Company's receipt signed by the Secretary or duly authorized collector. Agents or Solicitors are not authorized to collect or receipt for monthly instalments, unless authorized to do so by the Company in writing, signed by the President or Secretary, of which notice will be mailed to the holder of this contract.

SECTION 16.

Contracts are placed in series of not to exceed in the aggregate of all Contracts to a series of "Face Value" One Hundred Thousand Dollars (\$100,000) to each series, with the understanding that all Contracts of a given locality are to be placed in the same series as nearly as possible to do so, and with the understanding that each particular series of Contracts issued and in good standing upon the books of the Company shall not at any time exceed in the aggregate in "Face Value," inclusive of all Contracts of a series, One Hundred Thou-

sand Dollars (\$100,000). When, by reason of loans, delinquencies, cash surrenders, paid-up Contracts, deaths and maturities, the number of Contracts in a series is reduced below the maximum aggregate "Face Value" of One Hundred Thousand Dollars (\$100,000), as hereinbefore provided for, the Company may, at its option, refill the series in which there may be vacancies with subsequent applications for Contracts. All applications for Contracts shall be signed personally by the applicant, giving his or her name and occupation and Post Office address.

SECTION 17.

While the holder of this Contract is not in default as to any of the obligations or conditions imposed upon him or her by the terms and conditions and requirements set forth in this Contract and the application therefor, this Contract can be assigned on the books of the Company to any person indicated by the holder, upon the payment of a fee of One Dollar (\$1.00) per each One Thousand Dollars (\$1000), "Face Value" hereof, or Ten Cents (\$0.10) for each One Hundred Dollars (\$100.00), "Face Value" hereof, at the time such transfer is made, giving the name and Post Office address of the transferee. The Company assumes no responsibility as to the validity of any assignment, and subject to the provisions of section twenty-two (22) herein.

SECTION 18.

The Company shall have prior lien upon this Contract for all unpaid instalments, dues, fees or loans, and

no transfer of this Contract shall be valid against such lien.

SECTION 19.

The Company shall be bound by and be responsible for only such statements as are contained in this Contract and the application therefor, and no officer or agent, attorney or solicitor of this Company, general or special, or Provincial or State Manager, or Solicitor, or Correspondent or Contract purchaser has any authority to bind the Company by any promises, representations or any statements not contained in this Contract, or in the application therefor.

SECTION 20.

The Company will not issue to any one person, firm or corporation, a Contract whose "Face Value" exceeds Five Thousand Dollars (\$5,000) in any one series of Contracts issued.

SECTION 21.

The agreement between the parties hereto is completely set forth in this Contract and the application therefor, taken together, and none of its terms and conditions can be varied or modified, nor any forfeiture under it waived, except by an agreement in writing, passed by the Board of Directors of the Company, and signed by the President and Secretary of the Company; the authority for this purpose will not be delegated; no other person or persons has or will be given authority.

SECTION 22.

Should this Contract be transferred or assigned and

the transferee or assignee desire the death benefit as provided for in section twelve (12) herein, the Company shall require the said transferee or assignee to procure in writing from a practicing physician a certificate sworn to before a notary public stating that the said transferee or assignee is in ordinarily good health.

SECTION 23.

It is agreed by and between the holder hereof and the Company that the Company shall take as needed from the initial and all other instalments (excepting repayments and interest upon loans) paid in hereon a sum sufficient to pay this Contract's pro-rata share of the entire legitimate expenses of the Company, said expenses to be governed by the Board of Directors of the Company, it being agreed by the holder hereof that each Contract holder of each series of contracts shall share equally in the expenses aforesaid, and it is further agreed and guaranteed that all other sums received by said Company, including the initial and instalment payments, sums loaned and its earnings, profits from simple and compound interest on money loaned, delinquencies, paid-up certificates, cash surrenders, investments and fees, profits on loans sold at a bonus, and any other surplus accretions accruing, including any necessary apportion made by the Company shall remain in the Loan and Reserve Fund of each series until all Contract obligations are satisfied in the said series, after which the remainder, if any, may be apportioned to the surplus funds of the Company. It being further explicitly understood and agreed that nothing herein (Section 23), shall be so construed as to warrant the transfer to surplus

funds of any surplus except such as is actually earned and accrued after the full settlement of all the Contract obligations of any given series, as provided for in this section.

SECTION 24.

All interpretations of this Contract prior to a loan being granted, the laws, procedure and construction of force in the Province of British Columbia, Canada, shall control.

The following is given as information to Contract holders in order that they may know how and upon what kind of securities the Loan and Reserve Fund accumulations of the Company are loaned.

TERMS AND CONDITIONS

Under which the Loan and Reserve Fund accumulations are loaned.

(The owner of a Contract is hereinafter referred to as the "Holder" and The National Mercantile Company, Limited, as the "Company.")

1. In lending the Loan and Reserve Fund accumulations, preference and first consideration shall always be given by the Board of Directors of the Company to any applications for loans on file from the holders of Contracts under the terms and conditions set forth herein. Should, however, there be no application for a loan on file from a Contract holder, when the Company has funds on hand to loan or invest, the Company may then loan such funds to others on such terms as the Company wishes to make, or invest same to the best advantage, on adequate security, to be approved by the Board of

Directors of the Company. No application for a loan from any Contract holder will be considered by the Board of Directors of the Company if the applicant's Contract is not in good standing.

2. When the initial payment and five monthly instalments have been paid to the Company on a Contract, such payments shall render said Contract eligible to receive a loan in a sum equal to the "Face Value" of his Contract in the order of his application therefor out of the Loan and Reserve Fund of the particular series to which this Contract belongs, such Loan to be granted or funds supplied when accumulated therefor in accordance with all the Provisions and Terms and Conditions of the Contract, and the holder shall then be entitled to a loan of said amount applied for (on adequate security, to consist either of real estate, stocks, bonds or other property to be approved by the Board of Directors of the Company), immediately on the accumulation and receipt of the said amount in the Loan and Reserve Fund of the particular series to which this Contract belongs, subject to all applications for loans on file in the same series and entitled to prior consideration, first having been considered and disposed of by the Board of Directors of the Company, and loans to such prior applicants granted, or declined, or disposed of. All applications for loans shall be considered and disposed of by the Board of Directors of the Company (excepting loans granted on account of the death of a Contract holder, which loans take priority over loans applied for in the usual manner) in the order in which the applications are made for the Contract, priority govern-

ing according to the day, hour and minute of the aforesaid application. All applications for loans must be made upon the printed forms or blanks furnished by the Company, and no application for a loan will be considered unless same is made upon a printed blank form furnished by the Company for that purpose and provided that ten per cent. (10 per cent.) of the "Face Value" hereof shall have been paid in hereon.

3. When the holder of a Contract becomes entitled to and desires a loan and is offered a loan by the Company, the Holder shall, within thirty (30) days thereafter, furnish adequate security to consist, either of real estate, stocks, bonds or other property, to be approved by the Board of Directors of the Company and, if real estate security, the Holder shall furnish the Company a photographic view of the property on which a loan is desired, and shall also, within thirty (30) days, furnish at the Holder's expense, a complete abstract of title to the property on which such loan is desired, which abstract shall be examined by the attorneys for the Company; and if the title to said property be approved and a loan made thereon, the Holder shall, at the time of making such loan, execute and deliver to the Company a deed of trust or mortgage of such character and in such terms as the attorneys of the Company may require securing to the Company a first lien on said property; whereupon the Company shall loan to the holder a sum equal to, but not to exceed, the "Face Value" of his Contract, and the Holder shall be entitled, upon making of said loan, if he so desires, to receive credit upon the amount thereof, upon

surrender of his Contract for all monies paid thereon. The Holder shall pay to the Company, upon the making of such loan, not less than the sum of Seven Dollars (\$7.00) per month upon account of principal on each One Thousand Dollars (\$1,000) so loaned, or Seventy (70) Cents per month on each One Hundred Dollars (\$100) so loaned, and also the monthly instalment of interest at three per cent. (3 per cent.) computed annually, upon the balance remaining unpaid each year, and payable monthly. When the said monthly payments of Seven Dollars (\$7.00) on each One Thousand Dollars (\$1,000) loaned, or Seventy (70) Cents on each One Hundred Dollars (\$100) loaned or of any greater denomination shall aggregate an amount equal to the amount loaned (less the amount the Holder has paid the Company, if the Holder desires to surrender his Contract as aforesaid), then the collateral security shall be surrendered, or the deed of trust or mortgage shall be released. Or in lieu thereof the Holder may, at his option, repay said loan by making an equated monthly payment (which includes Principal and Interest) of Eight Dollars and Twenty (\$8.20) cents on each One Thousand (\$1,000) Dollars loaned, of which equated amount Seven Dollars (\$7.00) is principal, and One Dollar and Twenty (\$1.20) cents is interest, and when the said equated monthly payments of Eight Dollars and Twenty (\$8.20) cents on each One Thousand (\$1,000) Dollars so loaned shall aggregate an amount equal to the amount loaned, or of any lesser or greater denomination so loaned (less the amount the Holder has paid the Company, if the Holder desires to surrender

his Contract as aforesaid), then the collateral security shall be surrendered or the deed of trust, or mortgage, shall be released. The Company shall have sufficient time in which to appraise the property and determine the sufficiency of the security offered.

4. The borrower shall keep the property on which the Company has made a loan, as provided herein, if improved real estate, insured in some insurance company or companies, to be approved by the Company, against loss by fire, tornadoes or cyclones and at the expense of the borrower, in such sums as may be approved by the Company, the Policies of insurance to be made payable to the Company and left in its custody. The borrower shall pay, when due, all taxes assessed, all municipal or other assessments levied against said property, and all insurance premiums upon the policies of insurance aforesaid. Should the borrower fail to pay such taxes, assessments or insurance premiums when due, the Company may pay the same, and all sums so expended by the Company shall become due and be so much additional indebtedness secured by said mortgage, or deed of trust, and shall be paid to the Company by the borrower within sixty (60) days, with interest thereon at the rate of five per cent. (5 per cent.) per annum, otherwise said borrower to be in default. The borrower shall also pay for the preparation, executing and recording of all deeds, mortgages, bonds for title, and all other necessary expenses incident to the making of said loan. If the security for such loan or loans be shares of stock, or registered bonds, the same shall be assigned to the Company and the borrower shall pay all necessary expenses

of such registration and assignment and any other expense incident thereto. If the security for such loan or loans shall be bonds and certificates payable to the bearer, or other personal property, the possession thereof shall be delivered to the Company with the right to the Company to sell the same in case of default by the borrower in any of the terms of the contract or pledge. If the security for such loan or loans be promissory notes, tax certificates or written evidences of indebtedness, they shall be assigned to the Company at the time of making said loan or loans, with irrevocable authority to the Company to collect the same.

5. Should the holder of a Contract who has secured a loan, desire to pay off the principal of his loan before it becomes due, the Company will, upon request, allow him to pay off the principal, with interest due to date, at any time before maturity, by giving thirty (30) days' written notice to the Company.

6. No officer, or agent, or solicitor of the Company, general or special or Provincial or State agent or solicitor, correspondent or Contract purchaser has any authority to promise a loan at any particular time, or bind the Company by any promise, representations, or other statements as to when a loan can be made. The terms and conditions under which the loan and reserve fund accumulations are loaned are completely set forth herein in the foregoing paragraphs, and no one has or will be given authority to vary, modify, or change same.

7. In lending the Loan and Reserve Fund accumulations the Company may make such amendments to the rules and regulations as set out herein as may be

deemed proper by the Board of Directors of the Company and as required by the Laws of the various Provinces of the Dominion of Canada, and of the various States of the United States of America.

No. RR

Issue I

Series R N

THE NATIONAL MERCANTILE COMPANY,
LIMITED.

Home Office: Winch Building.

Vancouver, British Columbia, Dominion of
Canada.

“A National Loan, Savings and Investment Society.”
SPECIMEN COPY.

LOAN AND HOME PURCHASING
CONTRACT.

Issued to
John Doe, Esq.,

1000 Granville Street,
Vancouver, B. C. Canada.

FOR VALUE RECEIVED, I hereby sell, transfer and assign all my right, title and interest in the within Contract to the person indicated in the following Assignment Form:
(Please fill out carefully and plainly)

By Whom Assigned (Owner must sign)	To Whom Assigned (Purchaser)	Local Address Purchaser of	Transfer Date of	Registered Transfer	Secretary's Endorsement	Assignment Number
.....
.....
.....
.....
.....

THE INSTALMENTS on this Contract are due and payable on or before the fifteenth day of each calendar month following the date of the application therefor, and **MUST BE PAID PROMPTLY** each and every month in order to be entitled to a Loan as herein specified, or to be entitled to the Cash benefit when a Loan is offered the holder. The instalments on this Contract are payable at 420 Winch Bldg., Vancouver, Canada, to The National Mercantile Co., Ltd., unless the holder is otherwise notified by the Company in writing, and signed by an officer of the Company.

The following is a true copy of the application for which this Contract was issued:

An initial payment of One (\$1.00) Dollar is required to be paid on each One Hundred (\$100.00) Dollars "Face Value" of each Contract applied for. Contracts will not be issued for an amount less than Three Hundred (\$300.00) Dollars nor for more than Five Thousand (\$5,000) Dollars in any one Series.

Application for a Loan and Home Purchasing Contract to "A National Loan, Savings and Investment Society."

THE NATIONAL MERCANTILE COMPANY,
LIMITED.

Incorporated under the laws of the Dominion
of Canada in the Province of British
Columbia.

Home Office: Winch Building
Vancouver, B. C.

George E. Stillings, President.

I, John Doe, being of legal age and in ordinarily good health, hereby apply for one of your Loan and Home Purchasing Contracts of the "Face Value" of \$1500.00 in accordance with the plans of the Company as set out in said Contract and have paid Mr. Richard Roe, a solicitor (whose authority, I understand, extends only to the sale of Contracts issued by the Company under their printed Terms and Conditions), \$15.00 as initial payment for same, and I agree to pay the Company thereafter, without notice, a monthly instalment on said Contract of \$15.00 on or before the

fifteenth day of each month following the date hereof, until a loan has been granted, unless my Contract has been surrendered for a paid-up Contract, or cash surrender, as provided for in sections Three (3), Four (4), Five (5), Six (6) and Nine (9), under the head of Terms and Conditions of said Contract, or unless my Contract is transferred or carried to maturity, or surrendered on account of my death as provided for in section Twelve (12), under head of Terms and Conditions of said Contract.

I HAVE EXAMINED the plans of your Company and have read a printed copy of your Loan and Home Purchasing Contract and am familiar with and understand and accept all the Terms and Conditions of your Contract, and I make this application expressly and solely upon the Terms and Conditions of this application, and the Terms and Conditions of said Contract, and the Terms and Conditions under which the Loan and Reserve Funds are loaned and not upon the faith of any statement, promise, undertaking or guarantee on the part of said solicitor or any other person.

In witness whereof I have hereunto subscribed my name the year, month, day, hour and minute written below.

JOHN DOE, Applicant.

1000 Granville Street Address Vancouver, B. C.,
P. O. or City. Canada, Prov. or State.

RICHARD ROE, Agent.

Month, August, 1913.

Date, First.

Hour, 10. Minute, 30 A. M.

First Monthly Instalment to begin September 15,
1913.

NOTICE: Agents Are Authorized to Collect the Advance or Initial Payment Only.

TABLE OF VALUES.

Giving the value of this Contract under the columns as indicated; (2) Initial and Monthly Payments; (3) Credit Value on Contract when Loan is made; (4) Paid-up Contract Value; (5) Cash Surrender Value; (6) Temporary Loan Value; (7) Guaranteed Minimum Value. This table gives the value as indicated by column number for Contracts "Face Value" \$1,000.00. For contracts of larger or smaller denominations, the value increases or decreases accordingly.

Col. 1	Col. 2	Col. 3	Col. 4	Col. 5	Col. 6	Col. 7
No. of Months Contract in Force	Initial and Monthly Payments	Credit Value on Contract When Loan is Made	Paid-up Contract Value	Cash Sur- render Value	Temporary Loan Value	Guaranteed Minimum Value
1	\$ 10.00	.....	.....	.....	.....	.....
2	20.00	.....	.....	.....	.....	.....
3	30.00	.....	.....	.....	.....	.....
4	40.00	.....	.....	.....	.....	.....
5	50.00	.....	.....	.....	.....	.....
6	60.00	.....	\$ 15.00	.....	.....	\$ 8.00
7	70.00	.....	22.51	.....	.....	16.02
8	80.00	.....	30.02	.....	\$ 16.00	24.06
9	90.00	.....	37.54	.....	20.00	32.12
10	100.00	\$ 100.00	45.07	.....	24.00	40.20
11	110.00	110.00	52.60	.....	28.00	48.30
12	120.00	120.00	64.28	.....	32.00	56.42
13	130.00	130.00	72.36	.....	36.00	64.56
14	140.00	140.00	80.45	.....	40.00	72.72
15	150.00	150.00	88.55	.....	44.00	80.90
16	160.00	160.00	96.66	.....	48.00	89.10
17	170.00	170.00	104.78	.....	52.00	97.32
18	180.00	180.00	113.17	.....	56.00	105.56
19	190.00	190.00	121.35	.....	60.00	113.82
20	200.00	200.00	129.55	.....	64.00	122.10
21	210.00	210.00	137.76	.....	68.00	130.40
22	220.00	220.00	145.98	.....	72.00	138.72
23	230.00	230.00	154.22	.....	76.00	147.06
24	240.00	240.00	246.90	\$163.16	80.00	155.42
25	250.00	250.00	257.50	171.50	84.00	163.80
26	260.00	260.00	268.13	179.85	88.00	172.20
27	270.00	270.00	278.78	188.21	92.00	180.63
28	280.00	280.00	289.45	196.60	96.00	189.08
29	290.00	290.00	300.15	205.00	100.00	197.55
30	300.00	300.00	310.88	213.41	104.00	206.04
31	310.00	310.00	321.63	221.85	108.00	214.55
32	320.00	320.00	332.40	230.30	112.00	223.08
33	330.00	330.00	343.20	238.76	116.00	231.63
34	340.00	340.00	354.03	247.25	120.00	240.20
35	350.00	350.00	364.88	255.75	124.00	248.80
36	360.00	360.00	375.75	264.26	128.00	257.42
37	370.00	370.00	386.65	272.80	132.00	266.06
38	380.00	380.00	397.58	281.35	136.00	274.72
39	390.00	390.00	408.53	289.91	140.00	283.40
40	400.00	400.00	419.50	298.50	144.00	292.10
41	410.00	410.00	430.50	307.10	148.00	300.83
42	420.00	420.00	441.53	315.71	152.00	309.58
43	430.00	430.00	452.58	324.35	156.00	318.35
44	440.00	440.00	463.65	333.00	160.00	327.14
45	450.00	450.00	474.75	341.66	164.00	335.95
46	460.00	460.00	485.88	350.35	168.00	344.78
47	470.00	470.00	497.03	359.05	172.00	353.64
48	480.00	480.00	508.20	367.76	176.00	362.52
49	490.00	490.00	519.40	376.50	180.00	371.42
50	500.00	500.00	530.63	385.25	184.00	380.34
						389.29

Col. 1	Col. 2	Col. 3	Col. 4	Col. 5	Col. 6	Col. 7
No. of Months Contract in Force	Initial and Monthly Payments	Credit Value on Contract When Loan is Made	Paid-up Contract Value	Cash Sur- render Value	Temporary Loan Value	Guaranteed Minimum Value
51	\$510.00	\$510.00	\$541.88	\$394.01	\$188.00	\$398.26
52	520.00	520.00	553.15	402.80	192.00	407.25
53	530.00	530.00	564.45	411.60	196.00	416.26
54	540.00	540.00	575.78	420.41	200.00	425.30
55	550.00	550.00	587.13	429.25	204.00	434.36
56	560.00	560.00	598.50	438.10	208.00	443.44
57	570.00	570.00	609.90	446.96	212.00	452.54
58	580.00	580.00	621.33	455.85	216.00	461.67
59	590.00	590.00	632.78	464.75	220.00	470.82
60	600.00	600.00	644.25	473.66	224.00	479.99
61	610.00	610.00	655.75	482.60	228.00	489.19
62	620.00	620.00	667.28	491.55	232.00	498.41
63	630.00	630.00	678.83	500.51	236.00	507.65
64	640.00	640.00	690.40	509.50	240.00	516.91
65	650.00	650.00	702.00	518.50	244.00	526.20
66	660.00	660.00	713.63	527.51	248.00	535.51
67	670.00	670.00	725.28	536.55	252.00	544.84
68	680.00	680.00	736.95	545.60	256.00	554.20
69	690.00	690.00	748.65	554.66	260.00	563.58
70	700.00	700.00	760.38	563.75	264.00	572.98
71	710.00	710.00	772.13	572.85	268.00	582.41
72	720.00	720.00	783.90	581.96	272.00	591.86
73	730.00	730.00	795.70	591.10	276.00	601.33
74	740.00	740.00	807.53	600.25	280.00	610.83
75	750.00	750.00	819.38	609.41	284.00	620.35
76	760.00	760.00	831.25	618.60	288.00	629.90
77	770.00	770.00	843.15	627.80	292.00	639.47
78	780.00	780.00	855.08	637.01	296.00	649.06
79	790.00	790.00	867.03	646.25	300.00	658.68
80	800.00	800.00	879.00	655.50	304.00	668.32
81	810.00	810.00	891.00	664.76	308.00	677.99
82	820.00	820.00	903.03	674.05	312.00	687.68
83	830.00	830.00	915.08	683.35	316.00	697.39
84	840.00	840.00	927.15	692.66	320.00	707.13
85	850.00	850.00	939.25	702.00	324.00	716.89
86	860.00	860.00	951.38	711.35	328.00	726.68
87	870.00	870.00	963.53	720.71	332.00	736.49
88	880.00	880.00	975.70	730.10	336.00	746.33
89	890.00	890.00	987.90	739.50	340.00	756.19
90	900.00	900.00	1000.13	748.91	344.00	766.08
91	910.00	910.00	1012.38	758.35	348.00	775.99
92	920.00	920.00	1024.65	767.80	352.00	785.92
93	930.00	930.00	1036.95	777.26	356.00	795.88
94	940.00	940.00	1049.28	786.75	360.00	805.86
95	950.00	950.00	1061.63	796.25	364.00	815.87
96	960.00	960.00	1074.00	805.76	368.00	825.90
97	970.00	970.00	1086.40	815.30	372.00	835.96
98	980.00	980.00	1098.83	824.85	376.00	846.04
99	990.00	990.00	1111.28	834.41	380.00	856.15
100	1000.00	1000.00	1123.75	844.00	384.00	866.30

Exhibit 2.

An initial payment of One (\$1.00) Dollar is required to be paid on each One Hundred (\$100.00) Dollars "Face Value" of each Contract applied for. Contracts will not be issued for an amount less than Three Hundred (\$300.00) Dollars nor for more than Five Thousand (\$5,000.00) Dollars in any one series.

"A National Loan, Savings and Investment Society."
Application to

A. D. Baker & Company

**FOR A LOAN AND HOME PURCHASING
CONTRACT**

—IN—

**THE NATIONAL MERCANTILE
COMPANY, LIMITED.**

Incorporated under the Laws of the
Dominion of Canada, in the
Province of British
Columbia.

Home Office: Winch Building, Vancouver, B. C.
George E. Stillings, President.

I,.....being of legal age and in ordinarily good health, hereby apply for one of your Loan and Home Purchasing Contracts of the "Face Value" of \$..... in accordance with the plans of the Contract as set out in said Contract, and have

paid Mr....., a solicitor (whose authority, I understand, extends only to the sale of Contracts issued by you under their printed terms and conditions), \$....., as initial payment for same, and I agree to pay thereafter, without notice, a monthly instalment on said Contract of \$..... on or before the fifteenth day of each month following the date hereof, until a loan has been granted, unless my Contract has been surrendered for a paid-up Contract, or cash surrender, as provided for in Sections Three (3), Four (4), Five (5), Six (6) and Nine (9), under the head of Terms and Conditions of said Contract, or unless my Contract is transferred or carried to maturity, or surrendered on account of my death as provided for in Section Twelve (12), under head of Terms and Conditions of said Contract.

I HAVE EXAMINED the plans of your Contract and have read a printed copy of your Loan and Home Purchasing Contract and am familiar with and understand and accept all the Terms and Conditions of your Contract, and I make this application expressly and solely upon the Terms and Conditions of this application, and the Terms and Conditions of said Contract, and the Terms and Conditions under which the Loan and Reserve Funds are loaned and not upon the faith of any statement, promise, undertaking or guarantee on the part of said solicitor or any other person.

IN WITNESS WHEREOF I have hereunto subscribed my name the year, month, day, hour and minute written below:

..... Applicant
 Street Address
 P. O. or City
 Prov. or State
 Agent

Month191..)

Date)

Hour)

Minute M.)

First Monthly Instalment to Begin.....191..

Notice: Agents are authorized to collect the advance
 or initial payment only.

This Receipt is Not Good for More Than \$1.00 Per
 Each \$100.00 "Face Value" of the Contract
 Applied For.

A. D. BAKER & COMPANY,
 723 Chamber of Commerce Building,
 Portland, Ore.

\$.....191..

RECEIVED of.....
 \$.....to apply on a contract, "Face Value" \$.....,
 to be issued by in The National
 Mercantile Company, Limited.

Your next payment is due.....191..

.....
 Agent.

This is only a temporary receipt to be used at the
 time the initial payment is made. Receipts given upon

this form for monthly instalments will not be recognized by the Company.

No Contract will be issued to the same applicant whose "Face Value" exceeds Five Thousand (\$5,000) Dollars in any one Series of Contracts issued.

For the accommodation of my patrons I agree to receive and receipt for the monthly instalments to be paid upon contracts sold by myself or my agents.

SPECIAL NOTICE:—Agents are authorized to collect and receipt for the *initial* payment only. All monthly instalments must be paid according to instructions that will be sent to the Contract holder.

Each agent is supplied with a specimen copy of my Loan and Home Purchasing Contract. Ask to see same before making application.

Unless this application is attached to a Weekly Report the Agent must fill out and sign the following statement before forwarding this application:

I hereby certify that the applicant hereto has paid me \$..... as the initial payment on the contract applied for in this application.

I have not collected or received any other instalments from this applicant.

..... Agent

THIS SPACE FOR OFFICE

Checked for Errors.....
Contract Issued
Receipt Book Issued.....
Index Record

Each agent is provided with a specimen copy of my loan and home purchasing contract. Ask to see same, and be sure you read this contract before making application.

Now that you are a contract holder in the Company that issues this Contract, *its* interests and *your* interests are identical, therefore speak a good word for this, *your* Company, and assist us in increasing the membership in *your* community, for thus will your co-operation enhance the value of your contract. For each contract holder that you secure us you will be allowed a Cash Credit upon your own contract, thus you reduce the cost of your own holdings to the minimum.

Full terms and particulars of this offer will be explained to you upon application to

A. D. BAKER & COMPANY

723 Chamber of Commerce Building, Portland, Ore.

Exhibit 3

An initial payment of One (\$1.00) Dollar is required to be paid on each One Hundred (\$100.00) Dollars "Face Value" of each Contract applied for.

Contracts will not be issued for an amount less than Three Hundred (\$300.00)

Dollars nor for more than Five
Thousand (\$5,000.00) Dol-
lars in any one series.

"A National Loan, Savings and Investment Society."

APPLICATION FOR A LOAN AND HOME
PURCHASING CONTRACT

TO

THE NATIONAL MERCANTILE COMPANY,
LIMITEDIncorporated under the Laws of the Dominion of
Canada, in the Province of British Columbia

Home Office: Winch Building, Vancouver, B. C.

George E. Stillings, President

I,being of legal age and in ordinarily good health, hereby apply for one of your Loan and Home Purchasing Contracts of the "Face Value" of \$..... in accordance with the plans of the Company as set out in said Contract, and have paid Mr....., a solicitor (whose authority, I understand, extends only to the sale of Contracts issued by the Company under their printed terms and conditions), \$....., as initial payment for same, and I agree to pay the Company thereafter, without notice, a monthly instalment on said Contract of \$..... on or before the fifteenth day of each month following the date hereof, until a loan has been granted, unless my Contract has been surrendered for a paid-up Contract, or cash surrender, as provided for in Section Three (3), Four (4), Five (5), Six (6) and Nine (9), under the head of Terms and Conditions of said Contract, or unless my Contract is transferred or carried to maturity, or surrendered on account of my death as provided for in Section Twelve (12), under head of Terms and Conditions of said Contract.

I HAVE EXAMINED the plans of your Company and have read a printed copy of your Loan and Home Purchasing Contract and am familiar with and understand and accept all the Terms and Conditions of your Contract, and I make this application expressly and solely upon the Terms and Conditions of this application, and the Terms and Conditions of said Contract, and the Terms and Conditions under which the Loan and Reserve Funds are loaned and not upon the faith of any statement, promise, undertaking or guarantee on the part of said solicitor or any other person.

IN WITNESS WHEREOF I have hereunto subscribed my name the year, month, day, hour and minute written below:

..... Applicant
..... Street Address
..... P. O. or City
..... Prov. or State
..... Agent

Month 191..)

Date)

Hour)

Minute M.)

First Monthly Instalment to begin....., 191..

Unless this application is attached to a Weekly Report the Agent must fill out and sign the following statement before forwarding this application to the Company.

I hereby certify that the applicant hereto has paid me \$..... as the initial payment on the contract applied for in this application.

I have not collected or received any other instalments from this applicant.

..... Agent

THIS SPACE FOR COMPANY

Checked for Errors.....

Contract Issued

Receipt Book Issued.....

Index Record

Series Record

Index Card

Bookkeeper

Agts. Com. Statement.....

Agent will show here any instalments paid in advance.

..... \$.....

..... \$.....

..... Agent.

This page to be filled in at Company's Office

APPLICATION FOR A LOAN & HOME PUR- CHASING CONTRACT

TO

THE NATIONAL MERCANTILE COMPANY
Limited.

Home Office: Winch Bldg., Vancouver, B. C.

Name

P. O.....

Prov. or State.....

No..... Issue..... Series.....

Face Value, \$.....

.....

Agent

Received at Company's Office	
.....	191.....
Remarks	
.....	
.....	

Exhibit A.

Blue Sky Law.

OREGON BLUE SKY LAW

As Found in Chapter 341 of the
General Laws of Oregon for 1913
Effective June 3, 1913

Published by the Corporation Department of the
State of Oregon
R. A. WATSON
Corporation Commissioner

THE BLUE SKY LAW

Chapter 341, Laws of 1913.

To protect purchasers of stocks and bonds and prevent fraud in the sale thereof; to create a corporation department to administer this and other laws relating to the regulation and supervision of corporations, and providing penalties for the violation thereof.

§ 1. Domestic Investment Company, Defined.

The term "Domestic Investment Company," within the meaning of this act shall include:

- a. Every corporation, every co-partnership or com-

pany, every association and every person now organized or which shall hereafter be organized under and pursuant to the laws of this State, whether incorporated or unincorporated, which shall issue, sell or negotiate for the sale of any stocks, bonds or other securities of any kind or character whatsoever, other than the stock of state and national banks located in this State, bonds of the United States, and foreign governments in good standing, State or municipal bonds, or mortgages upon real property where the entire mortgage is sold and transferred with the notes secured by such mortgages, to any person or persons in the said State of Oregon.

b. Every corporation, company, co-partnership or association which shall issue, sell, offer or negotiate for the sale of any bonds secured by mortgage upon real property.

c. Every person, co-partnership, association or corporation now organized or which may hereafter be organized, doing business as a so-called investment, loan, benefit, co-operative, home, building and loan or savings and loan company, not specifically covered by the foregoing or by Sections 2 and 3 of this act, and not specifically exempted by the provisions of this act.

d. Sales of the stock of investment companies licensed under this act, when made by individual owners of the same, for their own account exclusively, and not made in the course of repeated or continuing transactions of a similar nature by such owner, shall not render the owner subject to the provisions of this act. [Laws, 1913, Chap. 341, page 668.]

§ 2. Foreign Investment Company, Defined.

The term "Foreign Investment Company" within the meaning of this act shall include every such corporation, co-partnership, company, association or person organized in any other State, territory or government. *Provided*, that whenever by law of this State, there is provided another system than that provided herein for the regulation, supervision or authorization of the issuance of stocks or bonds, or of the creation of liens upon the property of railroads (as the same are defined in Section 6886 of Lord's Oregon Laws, as amended by Chapter 77 of the General Laws of Oregon for the year 1911), or of Public Utilities (as the same are defined in Section 1 of Chapter 279 of the General Laws of Oregon for the year 1911), such railroads or public service utilities shall not be deemed to be a domestic or foreign investment company within the meaning of this act; *provided, further*, that this act shall not apply to railroads engaged in interstate commerce. [Laws 1913, Chap. 341, page 669.]

§ 3. Stock Broker Defined.

The term "Stock Broker" as used in this Act shall include every person, set of persons, association, company, co-partnership or corporation, whether organized under the laws of Oregon or of some other state, territory or government, who shall deal in stocks, bonds or other securities covered by this act, or who shall sell, offer or negotiate for the sale of any stock, bonds or other securities covered by this act in the State of Oregon, underwriting or purchasing such securities and reselling to any person or persons in the State of Oregon

at a commission or profit. [Laws 1913, Chap. 341, page 669.]

§ 4. Agent Defined.

The name "Agent" as used in this Act shall include any person who shall act for any investment company or stock broker in offering for sale, taking subscriptions for or negotiating for the sale, or selling any securities for any investment company or stock broker, either as an employee on a salary basis or for a commission. [Laws 1913, Chap. 341, page 669.]

§ 5. Corporation Department of the State of Oregon, and Commissioner.

There is hereby established a department to be known as the "Corporation Department of the State of Oregon," which department shall be in charge of a chief officer who shall be known as the Corporation Commissioner. The Governor shall, immediately after this act goes into effect, appoint such Commissioner, who shall hold office until the first Monday in January, 1917, unless sooner removed by the Governor for inefficiency or malfeasance in office; and thereafter, and at intervals of four years each, commencing on the first Monday in January, 1917, it shall be the duty of the Governor to appoint some qualified man as such Commissioner. [Laws 1913, Chap. 341, page 670.]

§ 6. Salary of Commissioner and Appointment of Clerks, Etc.

The Corporation Commissioner shall receive in full compensation for his services a salary of \$3,000 per annum, payable from the corporation fund in the manner

herein provided. He shall appoint such clerks, stenographers and assistants as may be actually necessary from time to time to properly discharge the duties of his office and may purchase such stationery, blanks, records, furniture, office supplies and equipment and incur such travel and subsistence expenses as may be necessary and incident to the performance of his official duties, to be paid by the State Treasurer from the fund known as the "Corporation Fund" herein created, upon the certified claims of the Commissioner, after audit and approval by the Secretary of State, in the same manner as other claims against the State are paid. [Laws 1913, Chap. 341, page 670.]

§ 7. Bond and Oaths of Office of Officers.

Before entering upon the duties of the offices to which they have been appointed, the Corporation Commissioner and the other employees of the department shall subscribe to an oath that they will faithfully and impartially discharge the duties of their respective offices. The Commissioner shall execute to the State of Oregon, a surety bond in such amount as the Governor may require, but which shall not be less than \$25,000. The cost of said bond shall be charged to the State and paid from the Corporation Fund. [Laws 1913, Chap. 341, page 670.]

§ 8. Corporations, Etc., Now Supervised by Secretary or Treasurer are Given Over to Commissioner.

The Secretary of State shall provide the Corporation Department with suitable office rooms and all books, records, documents, instruments, blanks, and

other equipment heretofore employed by the Secretary of State and State Treasurer in connection with the supervision of corporations, joint stock companies and associations, shall be turned over to the Corporation Department. All duties required by law to be discharged by the Secretary of State and State Treasurer, in connection with the supervision of corporations, joint stock companies and associations, shall, from and after the taking effect of this act, be discharged by the said Commissioner. All fees, charges, interest, fines and penalties provided by this act or heretofore paid to the Secretary of State and State Treasurer by foreign and domestic corporations, joint stock companies and associations, shall hereafter be paid into the Corporation Department, and together with the revenues from all other sources provided by this Act, shall go into a fund to be known as the Corporation Fund, and this fund shall be liable for all the expenses of the Corporation Department, as herein provided. It shall be the duty of the Commssioner quarterly to certify under oath to the State Treasurer and Secretary of State the total amount of receipts of the Corporation Department for each current quarter. Whenever the amount of money in the Corporation Fund shall exceed \$15,000, all in excess of \$10,000 shall be transferred by the State Treasurer to the general fund of the State. All fees and payments of every description required by this act to be made to the Corporation Commissioner, shall be paid by him to the State Treasurer on the first day of the calendar month following their receipt by the said Commissioner.

Section 9. It shall be unlawful for any domestic or foreign investment company, or stock broker, or any representative thereof, to sell, offer for sale, take subscriptions for or negotiate for the sale in any manner whatsoever of any stocks, bonds or other securities of any kind or character, other than those specifically exempted from the provisions hereof by this act, without a permit from the Corporation Commissioner, as hereinafter provided. [Laws 1913, Chap. 341, page 670.]

INVESTMENT COMPANIES.

§ 10. Investment Companies, Reports and Permits.

Before securing such permit it shall be necessary for each and every investment company to file in the office of the Corporation Commissioner, together with a filing fee of \$5.00, the following documents in addition to those now required by law to be filed by corporations, joint stock companies and associations, in the office of the Secretary of State, to wit:

(a) A statement showing in full detail the plan upon which it proposes to transact business.

(b) A copy of all contracts, bonds or other instruments which it proposes to make with or sell to its contributors or customers.

(c) A statement which shall show the name and location of the investment company, and an itemized account of its actual financial condition.

(d) The amount of its property and liabilities.

(e) Sample copies of all literature or advertising matter used or to be used by such investment company.

(f) Such other information touching its affairs as said Commissioner may require.

If such investment company shall be a co-partnership or association, it shall also file with the Corporation Commissioner a copy of its articles of co-partnership or association, and all other papers pertaining to its organization, and if it be a corporation organized under the laws of Oregon, it shall also file with the said Commissioner a list of the subscribers to its stock, showing the amount paid by each and whether in cash or otherwise, and verified copies of all of the other papers pertaining to its organization not otherwise required by law. If it shall be an investment company organized under the laws of any other state, territory or government, incorporated or unincorporated, it shall also file with the said Commissioner a certified copy of all amended and supplementary articles of incorporation or association, certificates of increase and decrease of capital stock, and of all other papers pertaining to its organization, and such other information as the Commissioner may require. If such foreign investment company be other than a corporation, it shall execute and file with the Corporation Commissioner a power of attorney in manner and form and with the effect as now or at any time hereafter provided for foreign corporations by the laws of this State. Also there shall be filed in the office of the said Commissioner by every domestic and foreign investment company now existing or hereafter organized, copies of its by-laws and all amendments thereof as soon as the same shall be adopted and approved by the said investment company; *provided*,

that the said Commissioner may, in his discretion, waive the filing of any of the documents or information required by this section, when the securities to be sold by the stock broker or investment company are listed in current standard manuals of investment, or when there shall be furnished other evidence of the solvency or reliability of the stock broker or investment company, that shall be satisfactory to the said Commissioner. [Laws 1913, Chap. 341, page 671.]

§ 11. All Papers and Reports Must be Sworn to by Member of Association Authorized.

All of the above described papers shall be verified by the oath of a duly authorized member of a co-partnership or association, if it be a co-partnership or association, and by the oath of the president and secretary, if it be incorporated, *provided* that the Corporation Commissioner shall have the power to require such officers to make affidavits to such other reports or information as he may call for. [Laws 1913, Chap. 341, page 672.]

§ 12. Commissioner When Statements and Documents are Filed, May Make Further Investigation.

It shall be the duty of the Corporation Commissioner to examine the statements and documents so filed, and if he shall deem it advisable he shall make or have made a detailed examination, audit and investigation of such investment company's affairs; *provided*, that such investment company may at its option, in writing, refuse to have such investigation made, in which event the said Corporation Commissioner shall reject its application.

If the Commisioner finds that such investment company is solvent, that its articles of incorporation or association, its constitution and by-laws, its proposed plan of business and proposed contracts contain and provide for a safe, fair, just and equitable plan for the transaction of business, the Commissioner shall without unnecessary delay issue to such investment company a statement reciting that such company has complied with the provisions of this act, that detailed information in regard to the company and its securities is on file in the Corporation Commissioner's office for public inspection and information, that such investment company is permitted to do business in this State, and such statement shall also recite in bold type that the Corporation Commissioner in no wise recommends the securities to be offered for sale by such investment company. But if said Corporation Commissioner finds that such articles of incorporation or association, charter, constitution and by-laws, plan of business or proposed contract contain any provision that is unsafe, unfair, unjust, inequitable or oppressive to any class of contributors or customers, or if he decides from his examination of its affairs that said investment company is not solvent or does not intend to do a fair and honest business, then he shall not grant such a company a permit as herein provided, and shall notify such investment company, in writing, of his decision. All charges received or collected and all expenses for any examination made under the provisions of this Section of this act shall be reported in detail by the Corporation Commisioner and a full report and record thereof made in detail. [Laws 1913, Chap. 341, page 672.]

§ 13. Stock Brokers, Permits.

The foregoing Sections 10, 11 and 12 shall apply to stock brokers, providing that stock brokers shall not be required to file a copy of each stock, bond or other security they shall handle. Any person applying to the Corporation Commissioner for a permit to do business as a stock broker shall furnish evidence (to be confirmed by the said Commissioner's investigation, as may be necessary) establishing the sound moral character and good business repute of the person so applying, and showing for what length of time and in what capacities he has been engaged in the sale of securities. Also, a statement of the names and of the residence and business addresses of all persons interested as principals, officers, directors and as managing or sales agents, and the nature of the interest of each. Also, a statement of their assets and liabilities, and such other information as the said Commissioner may require. Such permit shall entitle such stock broker to handle such stocks, bonds and other securities in the State of Oregon as are not objected to by the Corporation Commissioner, providing that such stock broker shall file on the first day of each month a list of the stocks, bonds and other securities on hand for sale, and handled by it during the preceding month; *and providing further*, that said Corporation Commissioner shall have authority to prohibit said stock broker from handling any of such issues at any time, or to cancel said broker's permit at any time he decides that said broker is not handling such securities as he deems good legitimate investments. [Laws 1913, Chap. 341, page 673.]

§ 14. Appeal, How Taken.

An appeal may be taken from the decision of the Corporation Commissioner refusing to grant a charter or certificate of authority to any stock broker or investment company to the Circuit Court of the State of Oregon for Marion County. Such appeal shall be taken by filing with the clerk of said court a certified transcript of all papers in the commissioner's office relating to such decision. The court shall upon such appeal be limited to a consideration of whether there has been abuse of discretion on the part of the Commissioner in making such decision. Such appeal shall be tried and determined by the court in a summary way, but otherwise as a suit in equity. [Laws 1913, Chap. 341, page 674.]

§ 15. All Changes in Charter, By-Laws, Increase or Decrease of Stock Must Be Approved by Commissioner.

No amendment of the charter, articles of incorporation, constitution and by-laws of any investment company, nor any increase or decrease of its capital stock, shall become operative until a copy of the same has been filed with and approved by the Corporation Commissioner as provided in regard to the original filing of charters and articles of incorporation, constitutions and by-laws, nor shall it be lawful for any such investment company to transact business on any other plan than that set forth in the statement required to be filed by Section 10 of this act, or to make any contracts for the sale of stocks, bonds or securities other than that shown in the copy of the proposed contracts required to be

filed by Section 10 of this act, until a written statement showing in full detail the proposed new plan of transacting business shall have been filed with the Corporation Commissioner, in like manner as provided in regard to the original plan of business and proposed contract, and the consent of the Commissioner obtained as to make such proposed new plan of transacting business and proposed new contract. [Laws 1913, Chap. 341, page 674.]

§ 16. Unlawful to Circulate or Issue Circulars or Documents in Regard to Stock and Securities Until Licensed.

It shall be unlawful for any investment company or stock broker or its or his agent to issue, circulate or deliver any advertisement, pamphlet, circular or other document in regard to its stock, bonds or other securities in the State of Oregon until after such investment company or stock broker shall have been licensed to sell its securities in the State of Oregon as provided in this act, and it shall be unlawful for any such licensed investment company or stock broker or its agents to issue, circulate or deliver any such advertisement, pamphlet, circular or other document, unless the same shall be signed and bear a serial number and a copy thereof first filed with the Corporation Department and the approval of the Corporation Commissioner obtained thereto, nor shall it be lawful for such investment company or stock broker or its agent to issue, circulate or deliver such advertisements, etc., after it has been notified of objection thereto by said Corporation Commissioner. [Laws 1913, Chap. 341, page 675.]

§ 17. Agents to Be Registered With Commission.

Any investment company or stock broker may appoint one or more agents, but no such agent shall do any business for said investment company or stock broker in this State until he shall first register with the Corporation Commissioner as agent for such investment company or stock broker and for each of such registrations there shall be paid to the Commissioner the sum of two dollars. Such registration shall entitle such agent to represent said investment company or stock broker as its agent until the first day of July following, when it shall be necessary to re-register such agent. Such permit, however, shall be subject to revocation at any time by the Corporation Commissioner. [Laws 1913, Chap. 341, page 675.]

§ 18. Companies and Brokers Must Make Yearly Report.

Every investment company, and every stock broker, domestic or foreign, shall file as of the close of business on June 30th, of each year, and at such other times as required by the Corporation Commissioner, a certified statement in such form as may be prescribed and furnished by the said Commissioner, setting forth its financial condition and the amount of its assets and liabilities and furnishing such other information concerning its affairs as said Commissioner may require. Every regular statement of June 30th, shall be accompanied by a filing fee of two dollars. Any investment company failing to file its report as of the close of business on June 30th of each year, within fifteen days of that date,

or failing to give any other or special report herein required, within thirty days after receipt of request or requisition therefor, shall forfeit its rights to do business in this State, and shall be subject to such further penalty as is hereinafter provided for violations of this Act. [Laws 1913, Chap. 341, page 675.]

§ 19. Accounts to be Kept by Double Entry and Quarterly Trial Balances Made Therefrom.

The general accounts of every investment company, domestic or foreign, doing business in this State, shall be kept by double entry, and such company, its co-partners or managing officers shall at least once in each quarter make a trial balance of such accounts, which shall be recorded in a book provided for that purpose; such trial balances and all other books and accounts of such company shall at all times during business hours, except on Sundays and legal holidays, be open to the inspection of the Corporation Commissioner and his deputies. [Laws 1913, Chap. 341, page 676.]

§ 20. Commissioner May at Any Time Examine Investment Companies or Brokers.

The Corporation Commissioner shall have general supervision and control over any and all investment companies, domestic or foreign, all stock brokers and all corporations, joint stock companies and associations doing business in this State, and all such domestic and foreign investment companies and stock brokers shall be subject to examination by the Commissioner or his duly authorized deputies at any time the said Commissioner may deem it advisable and in the same manner as

is now provided for the examination of state banks. The rights, powers and privileges of the Corporation Commissioner in connection with such examination shall be the same as is now provided with reference to the examination of state banks by the State Banking Department. [Laws 1913, Chap. 341, page 676.]

Note.—Sec. 458a. Fees of Bank Examiner.—On and after the 1st day of July, 1913, the Superintendent of Banks shall collect from each bank, for each examination of said bank, an amount regulated by the capital and surplus of such bank at the time of such examination, according to the following schedule:

For all banks having a capital and surplus of

Over \$20,000 and not over \$50,000	\$ 25.00
Over \$50,000 and not over \$75,000	30.00
Over \$75,000 and not over \$100,000	40.00
Over \$100,000 and not over \$150,000	50.00
Over \$150,000 and not over \$200,000	60.00
Over \$200,000 and not over \$250,000	75.00
Over \$250,000 and not over \$300,000	85.00
Over \$300,000 and not over \$500,000	100.00
Over \$500,000 and not over \$750,000	125.00
Over \$750,000 and not over \$1,500,000	200.00
Over \$1,500,000	250.00

And, in addition thereto, such bank shall pay, at the same time, an amount equal to one-hundredth of one per cent of its undivided profits and total deposits at the date of examination; *provided*, that balances due to other banks, postal savings deposits, interest-bearing certificates of deposit, savings department deposits and deposit of public funds, upon which interest is paid to

the State, county, district or city depositing same, shall not be included in the said total deposits of said bank. [Laws 1913, Chap. 360, page 747.]

§ 21. Revocation of Permits and Receivers.

Whenever it shall appear to the Corporation Commissioner that the assets of any investment company or stock broker doing business in this State are impaired to the extent that such assets do not equal its liabilities, or that it is conducting its business in an unsafe, inequitable or unauthorized manner, or is jeopardizing the interest of its stockholders or investors in stocks, bonds, or other securities by it offered for sale, or whenever any investment company or stock broker shall fail or refuse to file papers, statements or documents required by this act, without giving satisfactory reasons therefor, said Corporation Commissioner shall at once cancel its permit and if he shall deem advisable shall communicate such facts to the Attorney General, who shall thereupon at once make an investigation, and if the facts as presented to him by the said Corporation Commissioner are substantiated, he shall thereupon apply to a court of competent jurisdiction for the appointment of a receiver to take charge of and wind up the business and affairs of such investment company or stock broker, and if such fact or facts be made to appear it shall be sufficient evidence to authorize the appointment of a receiver and the making of such orders and decrees in such cases as equity may require. [Laws 1913, Chap. 341, page 676.]

§ 22. Distributing Stocks, Etc., for Promotion, or

Paying Dividends Prohibited Without Permit
from Commissioner.

It shall be unlawful for any investment company after it has been granted a permit under the provisions of this Act, to issue, sell or distribute any stocks, bonds or other securities for promotion or for any other causes, or on any other conditions than those set forth in its application, without first securing the approval of the Corporation Commissioner therefor. Neither shall it be lawful for any investment company, after it has been granted a permit under the provisions of this act, to pay any dividends in stocks, bonds or other securities without the approval of the Corporation Commissioner.

[Laws 1913, Chap. 341, page 677.]

§ 23. Making False Statements Prohibited.

Any person who shall knowingly or willfully (1) subscribe to or make or cause to be made any false statements or false entry in any book of any stock broker or of any investment company, foreign or domestic, or (2) exhibit any false paper with the intention of deceiving any person authorized to examine into the affairs of such stock broker or investment company, (3) make, or publish any false statement of the financial condition of such investment company, or the stocks, bonds or other securities by it offered for sale, shall be deemed guilty of a felony, and upon conviction thereof shall be fined not less than \$200 nor more than \$10,000, or shall be imprisoned for not less than one year nor more than ten years in the State Penitentiary, or both such fine and imprisonment, at the discretion of the court. [Laws 1913, Chap. 341, page 677.]

§ 24. Penalty for Violation of Blue Sky Law.

Any person or persons, agent or agents, investment company or stock broker who shall violate any of the provisions of this act shall be deemed guilty of a felony and upon conviction thereof shall be fined for each offense not less than \$100 nor more than \$10,000, or by imprisonment in the State Penitentiary for not less than ninety days nor more than one year, or by both such fine and imprisonment, at the discretion of the court. [Laws 1913, Chap. 341, page 677.]

§ 25. Fees Collected to be Turned Over to State Treasurer to be Kept as a Special Fund and Out of Which Salaries are to be Paid.

All fees herein provided for shall be collected by the Corporation Commissioner and by him shall be turned into the State Treasury; and all fees so turned into the State Treasury shall be credited to a special fund to be known as the Corporation Fund, which is hereby created and set aside for the purpose of paying all salaries and expense incident to the conduct of the Corporation Department and necessary for carrying this Act into full force and effect. [Laws 1913, Chap. 341, page 677.]

§ 26. Banking and Insurance Departments Not Affected by This Act.

Nothing in this Act shall be construed to repeal or modify the laws heretofore enacted giving the State Banking Department control of and supervision over corporations, individuals or co-partnerships engaged as their principal business in banking, as defined in Chap-

ter 171, Laws of 1911, and amendments thereto; nor shall any part of this act be construed to restrict in any manner the authority of the Department of Insurance of the State of Oregon, to supervise and control the formation and operation of corporations, individuals, or co-partnerships engaged in the transaction of an insurance business of any character, and which heretofore have been under the supervision of the said Department of Insurance of the State of Oregon. [Laws 1913, Chap. 341, page 677.]

§ 27. Commissioner Must Keep Records of All His Acts and Make Annual Reports to Governor.

The Corporation Commissioner shall keep as records of his office books showing all acts, matters and things done by him under the provisions of this act. Annually, on or before the first day of November, the Corporation Commissioner shall transmit to the Governor a report containing an accurate review of the work of the department for the fiscal year ending June 30th, preceding the date of said report, and which shall include the number of corporations, companies and associations of record in the department, the number of those dissolved and chartered during the year, the total amount of receipts and disbursements, and other material facts in connection therewith. The records of the Corporation Department shall be public records, and information shall be furnished to any one affected by the corporation laws, upon application therefor, except that the Corporation Commissioner may, in his discretion, withhold information relating to the private affairs of solvent corporations when in his judgment the same shall not be required

for the public welfare. [Laws 1913, Chap. 341, page 678.]

§ 28. Seal of Corporation Department.

The Corporation Department shall adopt a seal with the words "Corporation Department, State of Oregon," and such design as the Commissioner may prescribe engraved thereon, by which it shall authenticate its proceedings. Copies of all records and papers in the office of the Corporation Department, certified by the Commissioner and authenticated by the seal of the Department, shall be received in evidence in all cases equally and with like effect as the original. [Laws 1913, Chap. 341, page 678.]

Exhibit B.

**STATE OF OREGON
CORPORATION DEPARTMENT**

Salem, Oregon, March 1, 1914.

The following is a list of the companies to which permits have been granted by the Corporation Department of the State of Oregon, up to and including February 28, 1914:

A

Abernethy Heights Water Co.
Harvey Adams Lumber Co.
Advance Amusement Co.
Agency Plains Telephone Co.
Ahlstrom & Gunther
Alaska Coal Oil Co.

Alaska Shamrock Marble Co.
Albany Commission Co.
Albany Sand and Gravel Co.
Albany Steam Laundry.
Alber Bros. Milling Co.
Albina Fuel Co.
Albina Investment Co.
Albina Livery and Express Co.
Alder Investment Company
Albritton Townsite Co.
Alco Investment Co.
F. C. Allen & Co.
Althouse Placer Company
American Life & Accident Ins. Co.
American Realty Co.
American Sign Co.
Ames Bag Machine Co.
Anderson-Klockors Co.
Anglo-Pacific Realty Co.
The Antlers Theatre Co.
Applegate Valley Telephone Co.
The Armstrong Manufacturing Co.
Ashland Fruit & Produce Assn.
Ashland Iron Works
The Ashland Trading Co.
Associated Development Co.
Associated Security Co.
Astoria Dry Goods Co.
Astoria Grocery Co.
Astoria Hardware Co.
The Atchison-Allen Co.

Automatic Call & Advertising Clock Co.

Automatic Sprinkler Finance Co.

The Auto Top Co.

B

The B. & M. Supply Co.

Baker City Implement Co.

Baker City Packing Co.

Baker Mill & Grain Co.

Baker Players, Inc.

Baker Mines Company

Baldwin Sheep Company

Bandon Clay Products Co.

Bandon Construction Company

Bandon Farmers' & Merchants' Telephone Co.

Bandon Orchard Co.

Bandon Power Co.

Bandon Water Co.

Bankers Investment Co.

Bankers Mortgage Corporation

Barnes-Lindsey M'f'g Co.

Barnhart Investment Co.

Barrett Estate

The Bartle Sweany Co.

Bartlett, Sells & Hatfield Mfg. Co.

Battle Creek Telephone Co.

Bay City Land Co.

Bayocean Natatorium Co.

The Bazar

Beacon Investment Co.

Beaux Arts Building Co.

The Beaver Department Store

Beaver Lake Club
Beaver Portland Cement Co.
The Beaver State Hotel Corporation
Beaver State Motor Company
Beavis May Oil Co.
Behnke-Walker Business College
The Bentley Telephone Co.
Bethel Telephone Co.
Big Bend Threshing Company
Big Hill Coal Mining Co.
Blachly & Deadwood Telephone Co.
The J. R. Blackaby Commercial Co.
O. S. Blenchard Investment Co.
Bland Acreage Syndicate
Blue Mountain Creamery Co.
Board of School Trustees
Boss Wrench Company
Boone-Skinner & Co., Inc.
The Booth-Kelly Lumber Co.
Boyajohn-Arnold Company
The Sam Boyer Co.
Bradley Candy Co.
C. J. Breier Company of La Grande
Bright Building & Investment Co.
Broadway Dye and Cleaning Works
Brookfield Investment Co.
Wm. Brown & Co., Inc.
The Browning Company
Bruce Hot Water Circulator Co.
Buena Vista Power and Irrigation Co.
Building & Loan Land Co.

The Bungalow Co.
Burnside Company
Burkholder-Woods Co.
D. C. Burns Co.
Butte Falls Prune Growers Assn.
Butterworth-Stephenson Co.

C

Canby Canning Company
Cary's Mercantile Company
The Calapooya Springs Co.
Calef Bros.
The California and Oregon Coast Railroad Co.
Geo. S. Calhoun Company
Campbell-Frank Segar Co.
Camp Creek Water Co.
Capital Investment Company
The Capital Normal School
Carpenter Fence Post Co.
Carstens Packing Co.
Cascade Water Co.
The Castilloa Rubber Plantation Co.
The Cecilia Building Co.
Centennial Investment Co.
Central Oregon Live Stock and Agricultural Assn.
Central Point Telephone Co.
Central Sash, Door M'f'g Co.
Central Transfer Co.
Chase and Linton Gravel Co.
Chemical Products Co. of Oregon
The Cherry City Investment Co.
Cheshire, Dohs Poultry & Supply Co.

Christensen Concentrating Co.

Church & School Publishing Co.

Citizens Commercial Co.

City Iron Works

City Realty Co.

Clatskanie Co-operative Creamery Co.

Clatsop County Co-operative Cheese Assn.

Clatsop County Land Investment Co.

Claypoole Investment Co.

Clear Creek Mutual Telephone Co.

Cleveland Coles Valley Telephone Co.

Cleveland Development Co.

Colonial Security Co.

Columbia Awning & Shade Co.

Columbia County Lumber Co.

Columbia Harbor Wharf and Warehouse Co.

Columbia Milling Co.

Columbia Telephone Co.

The Commercial Advertising Co.

Commerce Safe Deposit and Mortgage Co.

Concordia Building Assn.

Condon Electric Co.

Connecticut Mortgage Co.

Consolidated Contract Company

Consolidated Life Insurance Co.

Co-operative Drainage Assn.

Coos Bay Brick & Clay Mfg. Co.

Coos Bay Home Telephone Co.

The Coos Bay Land & Investment Co.

Coos Bay Ice and Cold Storage Co.

Coos Bay Mill Co.

Coos County Meat Company
Coos and Curry Land Co.
Coos River Transportation Co.
Coquille River Fishermen's Co-op. Canning Co.
Coquille Tow Boat Company
Coquille Valley Fruit Growers Assn.
Coquille Valley Telephone Co.
Country Club Orchard Company
Corvallis Independent Telephone Co.
Craven Hardware Company
The Cream Store
Crystal Laundry Company
Culver Potato Warehouse Co.
Culver Warehouse Co.
Curry County Abstract-Realty Co.

D

Dallas Development Co.
The Dalles Fruit Growers Assn.
Dallas Hospital
Dallas Iron Works
Dallas Mercantile Co.
Darden-Garden Fruit Co.
Dayton Evaporating & Packing Co.
Dayton Manufacturing Co.
The Devils Gate Mining Co.
The Dingman Co.
Donald Nursery Co.
The Nancy Donaldson Mining Company
The Douglas County Building and Loan Assn.
Douglas County Light & Water Co.
Douglas Creditors Assn.

Douglas-Umpqua Mining Co.
 Drain Water Co.
 Dufur Orchard Co.
 Dufur Valley Fruit Growers Union
 Dundee Co-operative Fruit Growers & Packers
 The Frank E. Dunn Co.

E

Eagle Drug Company
 Eagle River Electric Power Co.
 East Side Planing Mill
 East Alder Investment Co.
 East Side Funeral Directors
 Eastern Liquor Company
 Eastern Manufacturing Co.
 Eastern Oregon Brewing Co.
 Eastern Oregon Co-op. Telephone Assn.
 Eastern Oregon Light and Power Co.
 Eastern Oregon Produce Co.
 Eastern Oregon Realty Co.
 Echo Auto Company
 Echo Mercantile Co.
 Edenbower Orchard Land Co., Inc.
 Eden Valley Power Co.
 Eggermont Orchard Company
 Elcar Desk Manufacturing Co.
 Electric Steel Foundry
 Elgin Commission Company
 Elgin Fruit & Development Co.
 Elgin Warehouse Co.
 El Jebel Dairy Farm
 Elk Creek Lumber Co.

Elppa Orchard Company
Enterprise Electric Company
Enterprise Planing Mill Co.
Empire Investment Co., Inc.
Eola Hills Walnut Assn.
Equitable Savings & Loan Assn.
Equity Warehouse Company
Eric-Oregon Fruit Co.
Eriksen Hardware Company
The Errol Heights Railway Co.
Estacada Fruit Growers Assn.
The Estacada Progress
Euclid Investment Company
Eugene Country Club
Eugene Fruit Growers Assn.
Eugene Planing Mill Co.
Eugene Woolen Mill Co.
Evergreen Cemetery
Ewauna Box Company
Ewbank Electric Transmission Company

F

Fairview Telephone Co.
The Farmers Independent Telephone Co.
Farmers Irrigating Co.
Farmers Mutual Telephone Co.
Farmers Mutual Warehouse Co.
Farmers Union Grain Agency
Farmers Union Store
Farmers Union Warehouse Company of Ione
Fernwood Dairy
Fidelity Copper Company

Fidelity Finance Co.

Field and Poorman Auto Truck Co.

Finnish Meat Market, Inc.

Finnish Mercantile Co.

Fir-Pine Lumber Company

The Firwood-Dover Telephone Co.

Henry Fleckenstein & Co.

The Fletcher Investment Co.

The Foard & Stokes Hardware Company

Food Products Company

Forest Grove Fruit Growers Assn.

Forest-Hill Investment Co.

Forest Grove Planing Mill

Fossil Milling and Electric Light Co.

Fossil Telephone Company

Foster-Moore Co.

Freeborn & Company

The Frigorific Company

G

Galloway Telephone Company

Gardiner Light & Power Co.

Gem Consolidated Gold Mining Co.

George Inlet Packing Company

Gerlinger Motor Car Company

Glacier Irrigating Company

Gladstone Lumber Company

W. B. Glafke Co.

Glide Building Association

Mollie Gibson Gold Mining and Milling Co.

Gold Beach Water, Light and Power Co.

The Golden Glow Milling Co.

The Golden Rule Mercantile Co.
Gordon Investment Company
Government Mineral Springs Hotel Co.
Grand Army Hall Association
Grant County District Agricultural Society
Grant County Mercantile Co.

H

Grants Pass Fruit Association
Grants Pass Feed Company
Grants Pass Rochdale Co.
The Grants Pass Holding Co.
Great Southern Railroad Co.
Green Mountain Copper Co.
Gresham Realty & Investment Co.
Guaranty Investment Corporation
Hair-A-Gain Company
Hammond Mortgage Company
The Hampstead Company
The Hanthorn Building Co.
Harbor Land Company
Harborton Water and Land Co.
The Hardwood Milling Co.
Harvey Mills Company
The Hart Cigar Co.
J. E. Haseltine & Co.
Hawley Pulp and Paper Co.
Hawthorne Grocery Co.
Hawthorne Avenue Stables
Hawthorne Bracket Co.
Hawthorne Syndicate
The Heavens Company

Heights Telephone Company
Heinecke Brothers Company
Heppner Farmers' Union Warehouse Co.
Hermiston Farmers Exchange
Hermiston Produce & Supply Co.
Hibernian Building Assn.
Hicks-Chatten Engraving Co.
Highland Improvement Co.
Highland-Surprise Consolidated Mining Co.
Hilgard Lumber Co.
Hillsboro Garden Tracts
Hillsboro Telephone Co.
Hofius Equipment Company
The Holdman Telephone Co.
Holloway's Farmers Store
Holly Condensed Milk Co.
E. H. Holt Piano Co.
Home Builders Association of Stanfield
Home Building and Realty Co.
Home Independent Telephone Co.
Home Telephone and Telegraph Co.
Hood River Apple Growers Union
Hood River Apple Vinegar Co.
Hood River Orchard Company
Hood River W. O. W. Hall Asn.
Hooper-Mayo Co.
Hotel Marion Company
Hot Lake Springs Company
Humbolt Consolidated Gold Mines
The Humphrey Memorial Methodist Episcopal Church
of Eugene, Oregon
Hydraulic Mines Development Co.

I

Ideal Tea Company
Imbler Storage Company
Imperial Farm Co.
Independent Telephone Co.
Inland Grain Growers Assn.
Interior Engineering Company
Interior Warehouse and Grain Company
International Booking Agency
International Cooling Company
International Dental Appliance Co.
International Jewel Company
Inter-State Logging Co.
The International Mining & Milling Co.
Interstate Theatre Company
Interurban Telephone Co.
Investment Realty Abstract Co.
Investors Association
Iowa-Medford Orchard Company
I. O. G. T. Hall Association
The Irwin-Hodson Company

J

Jackson County Building & Loan Assn.
Jacksonville Conserving Co.
Japanese Savings Association of Hood River
Jeffery & Bufton
Johnson-Bradford Safe Co.
Johnson-Gulovson Co.
Johnston Inc.
Jones Cash Store
Jones Market

Josephine Grocery Company

Josephine Hotel Company

Joseph Light and Power Co.

K

Andrew Kan Asiatic Importing Co.

J. M. Keister & Company

Kellogg Compensating Car Truck Co.

C. M. Kidd & Company

Kilham Stationery & Printing Co.

The W. F. King Company

Kenwill Telephone Company

The Kilgore Company

King & Caples Mercantile Co.

The Kingman Colony Irrigation Co.

The King-Smith Department Store

Klamath Hardware Company

Klamath Fuel Company

Klamath Hospital Assn.

Klamath Woodenware Co.

Klickitat Mineral Springs

R. H. Knight Company

Knight Shoe Company

Kokeel Kanu Klub

Korinek Veterinary Remedy Co.

Kospar Investment Company

L

Lafayette Building & Leasing Co.

La Grande Grocery Company, Inc.

Land Products Company

The Lakeview Ranch

Lawyers Title & Trust Co.

Leasing and Milling Company No. 1

The Lebanon Mutual Telephone Co.

Lehman and Clough Co.

Lewis River Lumber Company

Lewiston Land and Water Company, Ltd.

The Lewiston-Sweetwater Irrigating Co., Ltd.

Liberty Copper Mining Company

Lionite Powder Company

Lincoln-Tillamook Timber Co.

Linnhaven Orchard Company

Linnton Bowling Club

Linnton Publishing Company

Linnton Quarry Company

Lipman, Wolfe & Co.

Lower Columbia Agricultural Co.

Lucky Four Mining Company

Luckiamute Rural Telephone Co.

Lumbermens Trust & Savings Bank

Lunaburg, Dalton & Co.

M

McCarty & Co., Inc.

McCully Mercantile Co.

W. E. McIlhenny Co.

The McMinnville Building and Improvement Co.

Jas. McI. Wood & Company

McMinnville Local & Long Distance Telephone Co.

W. H. McMonies & Co.

McPherson-Ginser Co.

M. M. Company

Maccabee Building Assn. of Linton, Oregon

The Madras Union Warehouse Co.
Madras Wool Growers' Storage Co.
The Malheur and Baker County Telephone Co.
The Mallory Agency, Inc.
Marion County Land & Investment Co.
The Marshfield Cigar & Tobacco Co.
Marswell Savings & Investment Co.
The Masonic Bldg. Assn. of Tillamook
Emanuel May Investment Co.
Meadowbrook Orchard Company
Meadow Valley Land and Investment Co.
Medford Implement Company
Metropolitan Laundry Co.
The Meister Co.
L. B. Menefee Lumber Co.
Merchants Law & Collection Co., Inc.
The Metropolitan Investment & Improvement Co.
Metropolitan Realty Co.
Mexican Rubber Culture Co.
The Miami Valley Creamery Co.
Michigan-Oregon Logging Co.
Midvale Opera House Company
Miller Bros. Steelsmith Co.
Mills Addition Improvement Co.
Miriam Investment Company
Milwaukie Investment Company
Minnesota Log and Lumber Company
Minook Gold Dredging Company
Mission Tea Company
The Mitchell Drug Co., Ltd.
Mitchell Point Lumber Co.

Molalla Electric Co.
Molalla Irrigation Co.
Molalla Telephone Co.
R. J. McIsaac & Co.
The Molson Hop Farm Co.
Monarch Coal Company
Monks-Sherry Engineering Works
Monitor Orchard Company
Geo. W. Moore Lumber Co.
Morgan, Fliedner & Boyce
Moro Hardware and Implement Co.
Mosier Development Company
Mount Hood Hotel Company
Muir & McDonald Co.
Multnomah Amateur Athletic Club
Multnomah & Clackamas County Mutual Telephone Co.
Multnomah County Fair
Multnomah Iron Works
Multnomah Mortgage Company
Multnomah Warehouse Co.
Mutual Realty Company
Mutual Savings & Loan Assn.
Mt. Angel Brick & Tile Co.
Mt. Angel Telephone Co.
Mt. Baker Mining Co.
Mt. Hood Water Company
Mr. Hood Co-operative Creamery Assn. of Oregon
Mt. Scott Mutualist Assn.
Mt. Vernon Irrigation & Power Co.
Multnomah Amateur Athletic Club
Myrtle Point Transportation Co.

N

Nelson Iron Works, Inc.
Nehalem Telephone Company
Nehalem Harbor Company
Newport Ice & Fish Co.
Newberg Co-operative Growers Assn.
Newberg Telephone Co.
New Era Land and Investment Co.
Newberg Hardware & Plumbing Co.
Newberg M'f'g & Construction Co.
Nickum & Kelly Sand and Gravel Co.
Nisbeth Sanitarium
Normandee Land and Improvement Co.
North Albany Land Co.
North American Land Co.
North Coast Contract Co.
North End Telephone Co.
The Northwest Butter & Produce Co.
Northwestern General Trading Company
Northwestern Investment & Mtg. Co.
North Yamhill Water Co.
Norton & Hansen Stationery Co.
Nyebeach Amusement Club

O

The Oakdale Land-Investment Co.
Observer Printing Co.
Occidental Warehouse Co.
Ocean Beach Land Co.
The O. K. Barber Shop
Ogle Mountain Mining Co.

Olds, Wortman & King
Ontario Hardware Co.
Orchard Care Company
The Orchard Homes Telephone Co.
Oregon City Enterprise
Oregon Gold Prospecting and Promoting Co.
Oregon Grocery Co.
Oregon Printing Company
Oregon Securities Company
Oregon Apple Orchards Co.
Oregon Bond & Mortgage Co.
Oregon Bridge & Construction Co., Inc.
Oregon-California Auto Co.
Oregon Cement Sewer Pipe & Tile Co.
Oregon City & Farmers Independent Telephone Co.
The Oregon Co-operative Mercantile Assn.
Oregon Denison Block Co.
Oregon Dental Supply Co.
Oregon Gas & Electric Company
The Oregon Granite Co.
Oregon Hardware Company
Oregon Hassam Paving Co.
The Oregon Home Builders
Oregon Investment Co., Inc.
The Oregon Iron and Steel Co.
Oregon Japanese Savings & Enterprise Co.
Oregon Kansas Timber Co.
Oregon Land & Livestock Company
Oregon Logging and Timber Co.
Oregon Lumber and Construction Co.
Oregon Nursery Company

Oregon Realty Company
Oregon Realty & Trust Co.
Oregon Sand & Gravel Company
Oregon Taxicab Company
The Oregon Title & Trust Co.
Oregon Walnut & Filbert Co.
Oregon & Washington Lumber Co.
Oregon-Washington Telephone Co.
Oregon-Washington Underwriters, Inc.
Oregon-Wisconsin Timber Holding Co.
Oregon Yellow Fir Timber Co.
Osborn Hotel Company

P

Pacific Incorporators Company
Pacific Coast Cone Co.
Pacific Face Brick Co.
Pacific Furniture Specialties Mfg. Co.
Pacific Grocery Co.
Pacific Land, Loan & Timber Co.
Pacific Metal Works of Oregon
Pacific Specialty Company
Pacific States Fire Insurance Co.
Pacific Stationery and Printing Co.
Pacific Tank & Silo Company
Panama Building Co.
Parkersburg Telephone Co.
Parrett Mountain Telephone Co.
Patrick's
C. E. Pearce & Co., Incorporated
The Peerles Air Motor M'f'g Co.
Pendleton Wool Scouring and Packing Co.

Peiffer Bros. Leather Company
Peninsula Sand & Gravel Co.
The People's Company
Peterson & Sleret Co., Inc.
Phegley & Cavender
Philomath Farmers' Creamery Company
Pioneer Hardware Co.
Point Terrace Mill & Lumber Co.
Polk County Oil, Gas, Coal and Land Co.
Polk County Telephone Co.
Portland Bolt & Manufacturing Co.
Portland Butter & Produce Co.
Portland Central Heating Co.
Portland Concrete Pile Co.
Portland Cricket Club Assn.
Portland Gas & Coke Co.
Portland Gun Club
Portland Ice Hippodrome
Portland Knitting Co.
Portland Lumber Co.
Portland Mausoleum Co.
Portland Mexican Hardwood Company
Portland Mutual Savings Co.
Portland Natatorium Company
Portland and Oregon City Railway Co.
Portland Paper Box Company
Portland Police Band
Portland Pure Milk & Cream Co.
Portland Remedial Loan Assn.
Portland-Seaview Cranberry Co.
Portland Social Turn Verein

Portland Trunk Manufacturing Co.

Portsmouth Land Co.

Potlatch Coal Co.

Prineville Land & Livestock Co.

Prineville Mercantile Company

Pringle Falls Electric Company

Prouty Lumber and Box Co.

Protected Cove Orchards

Provident Trust Company

Prudential Realty Corporation

Purified Oil Company

Q

J. J. Quinland Company, Inc.

Quongyick Land Co.

R

Rader Brothers Company

The Raecolith Company

Railway Exchange Cigar Co.

Realty Associates of Portland

Red Clover Creamery

C. A. Richards Company

Richards Hotel Company

Richardson Investment Co.

Riverside Irrigation and Power Co.

Riverside Rural Telephone Co.

Rodeo Amusement Assn.

The Rogers and Swinden Mfg. Company

Rogue River Fruit & Produce Assn.

Rogue River Salmon Packers

Rogue River Water Company of Grants Pass

Rogue Valley Creamery
Roseburg Building Homes Assn.
Rose City Importing Company
Rose City Laundry Co.
Rose City Park Club
Rose City Park Grocery
Roseburg Rochdale Co.
Royal Arms Company
Royer Implement Co.
G. P. Rummelin & Sons
Rural Oregonian Publishing Co.
Russell & Gilbert Co.

S

Salem Brewery Assn.
Salem Fairfield Telephone Assn.
Salem Fruit Union
Salem Sand & Gravel Co.
Salem Water, Light & Power Co.
Sams Valley Local Telephone Co.
The Sand Gulch Mining Co.
Sanitary Market Co.
Santiam Woolen Mills
Saratoga Investment Co.
St. Johns Land Company
St. Helens Lumber Co.
Sterling Furniture Company
Schanen-Blair Co.
Scio Condensed Milk Co.
Seaside Light and Power Company
Seaside Knights of Pythias Building Corporation
The Security Land & Savings Company

Sellwood Dock Co.

Ross Sharp Company

Security Realty Syndicate

Schools Telephone Company

The C. A. Shultz Manufacturing Company

Shepard and Gearin, Inc.

Schwab Investment Company

Sheridan Lodge No. 46, Ancient Free & Accepted
Masons

The Scott Company

Sheridan Loganberry Co.

The Sheridan Timber Co.

Sherwood Telephone Co.

The Shiria Lumber Co.

Shuholm Company

Sigma Nu Alumni Assn., U. of O.

Silver Falls Timber Co.

Silverton Hop Growers Warehouse Assn.

The Silverton Creamery & Ice Co.

Siuslaw Creamery Association, Inc.

The Frank L. Smith Meat Co.

Smith River Mutual Telephone Co.

The Simpson Logging Co.

Smiths Incorporated

Smith & Umpqua Rivers Co-op. Creamery Co.

Southern Curry Telephone Co.

Southern Oregon Broom M'f'g Co.

The South Gem Mining Co.

South West Side Water Co.

Southwestern Warehouse Co.

Springbrook Canning Company

The Spring Valley Telephone Co.
Sroat, Evans & Martin
Standard Liquor Co.
The Star Flouring Mills
St. Johns Sanitarium
Sterling Stone Company of Portland
Stoddard Lumber Company
Sublimity Dairy Association
Sublimity Telephone Co.
The Suburban Company
Summit Timber Co.
Sunset Creamery Company
Sunset Fruit Co.
The Sutherlin Fruit Growers Assn.
Sutherlin Mercantile Co.
Svensen Development and Investment Co.
J. M. Sweek & Co.
Sweet Home, Foster and Cascade Tel. Co.
Sweet Home Mountain Water

T

Taft Mercantile Co.
Talent Coal Co.
Taylor-Knobel Co.
Taylor-Williams Co.
The M-H Terminal and Investment Co.
Ten Mile Telephone Co.
Texas-Oregon Power and Placer Mining Co.
Thermodyne Co.
Charles H. Thompson Co.
Thomsen & Company
The Three Lodes Mining Co.

Tigardville Telephone Co.

Tillamook Bay Fish Co.

Tillamook Co-operative Fish Co.

Tillamook Electric Light & Fuel Co.

Tillamook Mercantile Co.

Timber Power & Development Co.

Title and Trust Company

Tokay Heights Development Co.

Tourist Bed Company

The Tree Faller & Cutter Co.

Three Ridge Telephone Co.

Trinity Place Investment Co.

Troutdale Masonic Hall Assn.

Tualatin Valley Water Co.

Turner Electric Light & Power Co.

Turner Mercantile Co.

Turner Telephone Co.

U

Umbdenstock and Larsen Home Builders Investment
Co.

The Umpqua Power, Light and Ice Co.

The Umpqua Valley Investment Co.

Underwriters Loan and Investment Co.

Union Abstract Co.

Union Abstract Co. of Portland

Union Building Co.

Union Fishermen's Co-operative Packing Co.

Union Leader Mining Co.

Union Lodge No. 43, A. F. & A. M.

Union Pacific Life Ins. Co.

The Union Pine Lumber Co.

The United Shop
United States Commerce Co.
Union Supply Company
University Club

V

V. & W. Telephone Co.
Vale Hardware Co.
Vale Hot Springs Co.
Vale Improvement Co.
Vale Trading Co.
Valley Falls Mercantile Co.
The Valley Heating & Plumbing Co.
Valley and Siletz Railroad Co.
Valley Telephone Co.
Vanderbilt Orchard Lands Co.
Van Koughnet & Reder
Villa St. Clara Apartments
Village Inn Cafeteria

W

Wagoner & Company
Walk Over Boot Shop
Wallowa Athletic Assn.
M. J. Walsh Company
Washington St. Public Market
Watkins Coal Company
M. Weil Company
West Coast Specialty Company
Western Corporation
Western Engineering Works
Western Loan & Building Co.

Westfall Valley Telephone Co.
 Westover Company
 West Oregon Lumber Co.
 West Shore Oil Co.
 West Stayton Canning Company
 West Stayton Power & Railway Co.
 Western Bond & Mtg. Co.
 The Western Sales Co.
 Wheeler Lumber Co.
 Wherity, Ralston & Co.
 Willamette Realty Company
 Willamette Valley Irrigated Land Co.
 Willamette Valley Acreage Co.
 Willamette Valley Mortgage Co.
 Williams Bros. Door & Lumber Co.
 Willis-Johnstone Co.
 The Willow Creek and Cow Valley Tel. Co.
 Wilberg-Opppegard Investment Company
 Windle Investment Co.
 Woodard Wagon Road Co.
 Woodburn Bottling Works
 Woodlawn Mutualist Assn.
 Woodside-Troost Co., Inc.
 Woolgrowers Warehouse Co.
 J. A. Wuest Co.

Y

Yamhill County Mutual Telephone Co.
 Yamhill Development and Improvement Co.
 Yaquina Electric Company

This includes the entire list of companies whose

stocks, bonds, or other securities have been passed upon by the Corporation Department up to and including February 28, 1914. Any investment company, or agent thereof, or stock broker, or agent thereof, or person, who shall take subscriptions for, or issue, or sell or negotiate for the sale of any other securities than those listed above (except the stock of state and national banks located in this State, bonds of the United States and foreign governments in good standing, State or municipal bonds, or mortgages upon real property where the entire mortgage is sold and transferred with the notes secured by such mortgages, and securities listed in current Standard Manuals of Investment) will do so in violation of Chapter 341, G. L. 1913, and be subject to the penalties of the Act.

Very sincerely,

R. A. WATSON,

Corporation Commissioner.

Exhibit C.**PRELIMINARY STATEMENT OF CORPORATION DEPARTMENT.**

Sheet 1

PRELIMINARY REPORT—Sheet 1**PRELIMINARY STATEMENT****OF**

.....

TO THE**CORPORATION DEPARTMENT OF THE
STATE OF OREGON**

Made as of....., 191....

I. Is this Statement made by a corporation, co-partnership or company, association or person? As owner, or by lessee, trustee, or receiver (appointed by any court whatsoever)?

.....

II. Give the legal name, IN FULL.....

.....

If a corporation, under the laws of what state or county organized, and when:.....

.....

The location of the principal office:

III.

Officers		Name	Post Office Address
President	.....	.....	.....
Secretary	.....	.....	.....
Treasurer	.....	.....	.....
Attorney	.....	.....	.....
Directors:	1.	.....	.....
	2.	.....	.....
	3.	.....	.....
	4.	.....	.....
	5.	.....	.....
	6.	.....	.....
	7.	.....	.....
	8.	.....	.....
	9.	.....	.....
	10.	.....	.....

Name and post office address of chief officer or managing agent, or attorney in fact:

Name,

Title,; P. O. Address.....

Name and post office address of officer or agent or person within the State of Oregon with whom correspondence should be had regarding this report and who should be addressed generally in communications, notices, etc., from the Corporation Department of the State of Oregon:

Name,

Title, P. O. Address.....

IV. Attach hereto, marked "Exhibit A", a statement showing in full detail the nature of and plan upon which it is proposed to transact, or is transacting busi-

ness, and the purposes for and terms upon which its securities are being, or will be sold, and the plan adopted for their sale.

V. Attach hereto, marked "Exhibit B", copies of all forms of contracts, bonds, or other instruments used, or which it is proposed to use, in dealing with the public, certified to the effect that the copies of the contracts are true and correct copies of each contract made, or which will be made, with any person, officer, agent or representative of the investment company for the sale of its stock, and that there are no agreements, understandings or contracts, either verbal or written, express or implied, by which any one has received, or is to receive, any cash, stocks, securities, or other compensation for the sale of its securities, for its promotion, or for any other causes except as specified in this application and its several exhibits attached, and that all of the stock securities of the investment company will be sold or disposed of for cash or its equivalent, as provided in the contracts attached, except as herein excepted; also, copies of all forms of literature or advertising matter used or to be used.

VI. Attach hereto, marked "Exhibit C", a comprehensive statement showing the financial condition. In listing assets, give the amount, and nature of any and all incumbrances.

VII. Give a statement of the amount and distribution of capital stock, and securities, as per the following table.

(	(Common Stock - \$.....
Authorized Capital - - - (
(	(Preferred Stock - \$.....

	(Common Stock - \$.....
Issued and Outstanding (
	(Preferred Stock - \$.....

	(Common Stock - \$.....
Par value, one share - (
	(Preferred Stock - \$.....

Bonds authorized - - - - -	\$.....
Bonds issued - - - - -	\$.....
Other securities called, Authorized,	\$.....
Other securities called, Issued, -	\$.....

Total par value held by investment company:

	(Common Stock - \$.....
	(Preferred Stock - \$.....
In the treasury - - - (
	(Bonds - - - \$.....
	(Other Securities - \$.....

	(Common Stock - \$.....
	(Preferred Stock - \$.....
Pledged as collateral - (
	(Bonds - - - \$.....
	(Other Securities - \$.....

	(Common Stock - \$.....
	(Preferred Stock - \$.....
In sinking or other funds (
	(Other Securities - \$.....
	(Bonds - - - \$.....
	(Common Stock - \$.....
Total par value not held (Preferred Stock - \$.....	
by investment company (
	(Bonds - - - \$.....
	(Other Securities - \$.....

Dividends declared during year past:

Securities	Rate—Per Cent	Amount
Common Stock	\$.....
Preferred Stock	\$.....
Bonds	\$.....
Other Securities....	\$.....

A true and complete statement showing the consideration received from the stock issued and outstanding to date:

COMMON STOCK.

	No. Shares	Actual Value*	Remarks
Actual Cash
Notes
Real Estate
Plant
Equipment..
Patents
Organizing
Promotion
Commissions

Salaries .....	.....	.....	.....
Dividends ..	.....	.....	.....
.....
.....
Totals .....	.....	.....	.....

*This column should specify the actual amount of cash or notes received, or the actual value of real estate, etc., received in exchange for stock issued, and should correspond with value at which these different items were given in to the company and carried on the books.

PREFERRED STOCK.

	No. Shares	Actual Value	Remarks
Actual Cash
Notes
Real Estate.
Plant
Equipment
Patents
Organizing
Promotion
Commissions
Salaries
Dividends
.....
.....
Totals

BONDS.

	No. Shares	Actual Value	Remarks
Actual Cash

Notes .....	.....	.....	.....
Real Estate .....	.....	.....	.....
Plant .....	.....	.....	.....
Equipment ..	.....	.....	.....
Patents .....	.....	.....	.....
Organizing ..	.....	.....	.....
Promotion ..	.....	.....	.....
Commissions ..	.....	.....	.....
Salaries .....	.....	.....	.....
Dividends ...	.....	.....	.....
.....
.....
Totals .....	.....	.....	.....

VIII. Attach hereto, marked "Exhibit D", a complete and detailed statement showing for what purposes the funds received from the sale of securities have been, or will be, expended. Mention, and set out particularly, the proportion of the securities which have been expended, or it is planned to expend for promotion purposes.

IX. Attach hereto, marked "Exhibit E", a statement describing fully the real estate, plant, equipment, patents, etc., received in exchange for stock or other securities, indicating amount and kind of securities exchanged for each item.

X. Give a true statement of the assets and liabilities of the investment company, as follows:

ASSETS.

	Amount	Write Nothing in This Column
Real Estate	\$.....

Bills Receivable .....	\$.....	.....
Accounts Receivable....	\$.....	.....
Cash on Hand.....	\$.....	.....
Cash in Banks.....	\$.....	.....
Other assets as follows..	\$.....	.....
.....	\$.....
.....	\$.....
.....	\$.....
Total .....	\$.....	.....

Exhibit D.

PRELIMINARY STATEMENT OF CORPORATION DEPARTMENT.

Sheet 2.

Preliminary Report—Sheet 2.

LIABILITIES.

	Amount	Write Nothing in This Column
Common Stock Outstanding.	\$.....
Preferred Stock Outstanding	\$.....
Bonds Outstanding.....	\$.....
Mortgages	\$.....
Bills Payable	\$.....
Accounts Payable	\$.....
Sinking Fund or Reserve...	\$.....
Surplus	\$.....
Other Liabilities as follows..	\$.....
.....	\$.....
.....	\$.....
.....	\$.....
Total	\$.....

XI. Attach hereto, marked "Exhibit F", a true

and corect balance sheet of the books of the investment company, to date.

XII. Give a true statement of the profit and loss account for themonths prior to date,
6 or 12
as per the following table.

Loss		
Carried to surplus.....	.....	.....
Dividends, common stock, ..per cent.....	.....	.....
Dividends, preferred stock,..per cent....	.....	.....
Interest paid on bonds.....	.....	.....
Interest, borrowed money.....	.....	.....
Operating Expenses .....	.....	.....
Commissions .....	.....	.....
Salaries .....	.....	.....
.....
Gain .....	.....	.....

Total .....	.....	.....

Profit		
Undivided profits, 19....	.....	.....
Gross earnings, (specify sources).....	.....	.....
.....
.....
.....
.....
.....
.....
.....
.....
Loss .....	.....	.....

Total .....	.....	.....

XIII. Attach hereto, marked "Exhibit G", a true and complete statement of receipts and disbursements for the pastmonths, as shown by the

6 or 12

books.

XIV. If a copartnership or association, attach hereto, marked "Exhibit H," a copy of its articles of copartnership or association and all other papers relating to its organization:

If a corporation, organized under the laws of Oregon, attach hereto, marked "Exhibit H," a list of the subscribers to its stock, showing the amount paid by each, and whether in cash or otherwise, and verified copies of all of the other papers pertaining to its organization not otherwise required by law:

If an investment company, organized under the laws of any other state, territory, or government, incorporated or unincorporated, attach hereto, marked "Exhibit H," certified copy of all amended and supplementary articles of incorporation or association, certificates of increase or decrease of capital stock, and all other papers pertaining to its organization.

XV. If such foreign investment company be other than a corporation, it shall execute and file, herewith, a power of attorney in manner and form and with the effect as now provided for foreign corporations by the laws of this State.

XVI. Give following a true statement in regard to the officers and directors of the investment company:

Name	Address	No. Shares and Bonds owned			Actual cash invested in company	Salary per year	Estimate net worth	Time devoted to company
		Common	Pref'd	Bonds				
..... President.
..... Vice President.
..... Secretary.
..... Treasurer.
..... General Manager.
Trustees and
Directors
1
2
3
4
5
6
7
8
9
10

XVII. Attach hereto, marked "Exhibit I," a certified copy of the minutes of the Board of Directors accepting and authorizing the information and data, and all of it, given herewith.

INSTRUCTIONS TO INVESTMENT COMPANIES.

The foregoing preliminary report is required by, and

is framed in accordance with, the following sections of Chapter 341 of the General Laws of Oregon for 1913:

Section 9. It shall be unlawful for any domestic or foreign investment company, or stock broker, or any representative thereof, to sell, offer for sale, take subscriptions for or negotiate for the sale in any manner whatsoever of any stocks, bonds or other securities of any kind or character, other than those specifically exempted from the provisions hereof by this act, without a permit from the Corporation Commissioner, as hereinafter provided.

Section 10. Before securing such permit it shall be necessary for each and every investment company to file in the office of the Corporation Commissioner, together with a filing fee of five dollars, the following documents in addition to those now required by law to be filed by corporations, joint stock companies and associations, in the office of the Secretary of State, to-wit:

(a) A statement showing in full detail the plan upon which it proposes to transact business.

(b) A copy of all contracts, bonds or other instruments which it proposes to make with or sell to its contributors or customers.

(c) A statement which shall show the name and location of the investment company, and an itemized account of its actual financial condition.

(d) The amount of its property and liabilities.

(e) Sample copies of all literature or advertising matter used or to be used by such investment company.

(f) Such other information touching its affairs as said commissioner may require.

If such investment company shall be co-partnership or association, it shall also file with the Corporation Commissioner a copy of its articles of co-partnership or association, and all other papers pertaining to its organization, and if it be a corporation organized under the laws of Oregon, it shall also file with the said commissioner a list of the subscribers to its stock, showing the amount paid by each and whether in cash or otherwise, and verified copies of all the other papers pertaining to its organization not otherwise required by law. If it shall be an investment company organized under the laws of any other state, territory or government, incorporated or unincorporated, it shall also file with the said commissioner a certified copy of all amended and supplementary articles of incorporation or association, certificates of increase and decrease of capital stock, and of all other papers pertaining to its organization, and such other information as the commissioner may require. If such foreign investment company be other than a corporation, it shall execute and file with the Corporation Commissioner a power of attorney in manner and form and with the effect as now or at any time hereafter provided for foreign corporations by the laws of this State. Also there shall be filed in the office of the said commissioner by every domestic and foreign investment company now existing or hereafter organized, copies of its by-laws and all amendments thereof as soon as the same shall be adopted and approved by the said investment company. *Provided*, that the said commissioner may, in his discretion, waive the filing of any of the documents or information required by this section, when the securities to be

sold by the stock broker or investment company are listed in current standard manuals of investment, or when there shall be furnished other evidence of the solvency or reliability of the stock broker or investment company, that shall be satisfactory to the said commissioner.

Section 11. All of the above described papers shall be verified by the oath of a duly authorized member of a co-partnership or association, if it be a co-partnership or association, and by the oath of the president and secretary. If it be incorporated; *provided*, that the Corporation Commissioner shall have the power to require such officers to make affidavits to such other reports or information as he may call for.

Following question XVII, execute the following verification and acknowledgment, in accordance with Section 11, quoted above:

State of Oregon,)

) ss.

County of)

...., the undersigned,

(Name or names)

.....of the

(official title or titles)

being first duly sworn, depose and say: That.....

.....the duly elected, qualified and acting of the above

(official title or titles)

named investment company; that.....familiar with the conduct of it business and its affairs; that..... have investigated and know its financial

condition; that each and all of the representations in the foregoing statements made, from numbers I to XVII, inclusive, have been prepared by and under their direction; that.....have carefully examined each and all of the said representations; that.....familiar with the subject matter thereof and.....fully competent and qualified to testify as to the truth of the said representations; and that the returns, statements and answers therein are each and all of them true to the best of.....knowledge, information and belief.

In Witness Whereof,have hereunto set.....
 hand.. and have caused to be hereunto affixed the
 official seal of the said.....
, at
, on this the
day of191..

.....

 (Official title)

.....

 (Official title)

State of Oregon,)
) ss.

County of)

On this.....day of, 191..,
 (Official title or titles)

before me appeared.....to me
 personally known, who, being duly sworn, did say that
the
 (Official title or titles)

of and that the seal affixed to said instrument is the corporate seal of said investment company and that said instrument was signed and sealed in behalf of said investment company by authority of its Board of Directors, and said acknowledged said instrument to be the free act and deed of said investment company.

In Testimony Whereof, I have hereunto set my hand and affixed my official seal on this the day and year first in this my certificate written.

.....

Notary Public for Oregon.

Arrange the statement in due order and staple at the top. Mail it to the undersigned, accompanied by a filing fee of \$5.00, as provided in Section 10, quoted above.

Very respectfully,

R. A. WATSON,
Corporation Commissioner.

Exhibit E.

APPLICATION OF STOCK BROKER.

To the Corporation Commissioner of the State of Oregon:

I,, a stock broker, of No.....Street, of the City of..... County of....., and State of Oregon, hereby make application for a permit to do business as a stock broker, in accordance with the provisions and requirements of Chapter 341, General Laws of Oregon for 1913.

I.

Below find the names and addresses of five men, including two brokers, who will vouch for my sound moral character and good business repute:

Name	Occupation	Address
.....
.....
.....
.....
.....

II.

Below find a statement showing for what length of time, in what capacities, and at what place I have been engaged in the sale of securities:

.....

.....

.....

.....

.....

.....

.....

.....

.....

.....

III.

The statements contained in paragraph II can be verified by the following persons:

Name	Address
.....
.....
.....
.....

IV.

Attached hereto, marked Exhibit A, find a statement of the names, residences, and business addresses of all persons interested with me, as principals, officers, directors, managing or sales agents, and the nature of the interest of each, together with a concise statement of the assets and liabilities of each.

V.

Attached hereto, marked "Exhibit B", find a detailed list of securities handled by me during the month last past, giving the price paid, and the price received, the amount sold, and such explanation in regard thereto as may be desired.

VI.

Attached hereto marked "Exhibit C" find detailed list of securities now held by me, set out in the manner required by Paragraph V.

VII.

I enclose my check for \$5.00 as required by Section 10, of Chapter 341, General Laws of Oregon for 1913.

Signed.....,
Address.....

Exhibit F.

Stock Broker's Monthly Report.

STOCK BROKER'S MONTHLY REPORT

TO THE

**CORPORATION DEPARTMENT OF THE
STATE OF OREGON.**

PLEASE NOTE—In making the report, if there is insufficient space under any of the numbered subdivisions to list the securities to be reported, attach the list, according to the form given, and on a separate sheet of paper, and under the heading of the appropriate subdivision, at the end of the report. The Corporation Commissioner will not require the report of transactions in the stocks of State and national banks located in this State, bonds of the United States and foreign governments in good standing, State or municipal bonds, or mortgages upon real property where the entire mortgage is sold and transferred with the notes secured by such mortgages. Reports of transactions in recognized securities listed in Standard Manuals of Investment will not be required.

Stockbrokers dealing only in securities classified as above should file, on the first of each month, a certified statement to the effect that the entire list of securities on hand, and those handled during the preceding month, were in the above classifications and therefore exempt from detailed report.

Monthly reports should be executed on the first day of each month. Continued delay and tardiness in the

2—BONDS.

COMPANY NAME	Number Bonds	Description	Listed or pur- chased at	To be sold at	Broker's commission or profit	REMARKS
.....
.....
.....
.....
.....
.....
.....
.....
.....
.....

3—OTHER SECURITIES.

COMPANY NAME	Amount	Description	Listed or pur- chased at	To be sold at	Broker's commission or profit	REMARKS
.....
.....
.....
.....
.....
.....
.....
.....
.....
.....

I also further report and certify that during the month ending....., 191..., I have handled the following stocks, bonds or other securities.

R. A. Watson, Corporation Commissioner, et al. 163

Subscribed and sworn to before me on this.....
day of, 1913.

.....
Notary Public for the State of Oregon.

Province of British Columbia,)

Dominion of Canada, .)

County of Vancouver.)

I, George E. Stillings being first duly sworn, depose and say that I am the president of The National Mercantile Company, Limited, plaintiff, in the above entitled suit; and that the foregoing Bill of Complaint is true as I verily believe.

George E. Stillings.

Subscribed and sworn to before me this 14th day of April, 1914.

(Notarial Seal)

N. R. Robertson,

Notary Public in and for the Province of
British Columbia.

Filed April 20, 1914. A. M. Cannon, Clerk.

And afterwards, to wit, on the 23rd day of April, 1914, there was issued out of said Court in said cause a subpoena ad respondendum which, with the return service thereon and the motion for a preliminary injunction, affidavits and order to show cause thereon, is in words and figures, as follows, to wit:

SUBPOENA AD RESPONDENDUM.

THE PRESIDENT OF THE UNITED STATES
OF AMERICA,

To R. A. Watson, Corporation Commissioner, A.

M. Crawford, Attorney General, and Walter H. Evans,
Dist Atty. in Multnomah County, GREETING:

You, and each of you, are hereby commanded that you be and appear in said District Court of the United States, at the Court Room thereof, in the City of Portland, in said District, on the 13th day of May, A. D. 1914, to answer the exigency of a Bill of Complaint exhibited and filed against you in our said Court, wherein The National Mercantile Company, Limited, a corporation, is complainant, and you are defendants, and further to do and receive what our said DISTRICT COURT shall consider in this behalf, and this you are in no wise to omit under the pains and penalties of what may be all thereon.

And this is to command you, the MARSHAL of said District, or your DEPUTY, to make due service of this our Writ of SUBPOENA AD RESPOND-
ENDUM and to have then and there the same.

Witness the Honorable CHARLES E. WOLVERTON, Judge of said District Court, and the seal thereof, at Portland, in said District this 23 day of April, A. D. 1914, and of the Independence of the United States, the One hundred and thirty-eighth.

(SEAL)

A. M. CANNON, Clerk.

By F. L. Buck, Deputy.

MEMORANDUM pursuant to Equity Rule No. 12 of
the Supreme Court of the United States:

The defendant is required to file his answer or
other defense in the above entitled suit in the office of

the Clerk of said Court on or before the twentieth day after service, including the day thereof; otherwise the Complainant's Bill therein may be taken *pro confesso*.

STATE OF OREGON,)

) ss.

County of Multnomah.)

I, A. D. Baker, being first duly sworn, depose and say:

That on the 22nd day of April, 1914, by order of the Honorable Charles E. Wolverton, Judge of this Court, the deponent was authorized to serve the order in this action, which is hereto attached; and on the 23rd day of April, 1914, by the order of the Honorable Charles E. Wolverton, Judge of this Court, the deponent was authorized to serve the subpoena in this action.

That on the 23rd day of April, 1914, in the City of Salem, County of Marion, State of Oregon, the deponent served the subpoena, bill of complaint, order hereto attached and affidavits upon the defendant R. A. Watson, Corporation Commissioner, by delivering to and leaving with the said R. A. Watson personally a duly certified copy of the said documents, and that the deponent knew the said R. A. Watson so served to be the person mentioned, and to be the Corporation Commissioner of the State of Oregon.

That after due and diligent search and inquiry, I have been unable to find the within named defendant A. M. Crawford within the State of Oregon, and I further certify that I served duly certified copies of the subpoena, bill of complaint, order hereto attached and

affidavits within the State of Oregon on the 23rd day of April, 1914, on the within named A. M. Crawford, Attorney General of the State of Oregon, by delivering the said duly certified copies thereof to Mrs. A. M. Crawford, a white person over the age of 14 years, a person of the family, namely, wife of the said defendant A. M. Crawford, at the dwelling house and usual place of business of the said defendant A. M. Crawford in the State of Oregon.

That on the 24th day of April, 1914, the deponent served the subpoena, bill of complaint, order hereto attached and affidavits upon the defendant Walter H. Evans, being the District Attorney of Multnomah County, State of Oregon, by delivering to and leaving with the said defendant personally a duly certified copy of said documents; and that the deponent knew the person so served to be the person mentioned.

That pursuant to Rule 266 of the judicial code the deponent gave notice, as therein provided, to the Governor and Attorney General of the State of Oregon, by delivering to them and leaving with Oswald West and A. M. Crawford, Governor and Attorney General respectively, in the City of Salem, Oregon, a duly certified copy of the bill of complaint, order and affidavits and notice of hearing, and that the deponent knew the persons so served to be and the Governor and Attorney General of the State of Oregon.

A. D. BAKER.

Subscribed and sworn to before me this 24th day of April, 1914.

(Seal)

GEORGE ROSSMAN.

Notary Public for Oregon.

MOTION FOR PRELIMINARY INJUNCTION.

To the Honorable Judge of the District Court of the United States in and for the District of Oregon:

The application of the National Mercantile Company, limited, a corporation, the above named plaintiff, shows to this honorable Court as follows:

I.

That this plaintiff has, in the regular manner, filed herein its complaint, and instituted this cause, the object and purpose being to restrain the defendants and each and all of them from bringing any suit or action, or in any other manner enforcing the provisions of Chapter 341 General Laws of Oregon for 1913, entitled "An Act to protect purchasers of stocks and bonds and prevent fraud in the sale thereof; to create a Corporation Department to administer this and other laws relative to the regulation and supervision of corporations, and providing penalties for the violation hereof," and that the said Act be decreed to be unconstitutional and void, and of no effect whatsoever; and the plaintiff and its agents, employees, brokers and dealers in its applications for loans and contracts or undertakings for loans, and its mortgages, as in the complaint on file herein described, may be decreed to have the right to take such applications, make such contracts or undertakings, and offer the same for sale in the State of Oregon, and accept such mortgages as security for its loans and deal in the same, and conduct its business in the same without compliance in any manner or way whatsoever with the regulations and restrictions

in said Act provided and set forth; and the plaintiff, its agents, brokers and employees be freed from threats of arrest, and arrests instituted or threatened to be instituted by the defendants; and that the plaintiff, its agents, employees and dealers in its applications, undertakings for loans and mortgages, may be secured against unlawful and illegal trespasses and arrests by reason of any alleged violations of said act; and that the said R. A. Watson, defendant, the said Corporation Commissioner, his agents and employees of every kind whatsoever, and the agents and employees of the Corporation Department mentioned in said Act in the complaint may be perpetually and forever restrained by the order and injunction of this Court from enforcing, or attempting to enforce, any provision of the said Act 341 of the General Laws of Oregon for 1913, and from hindering in any manner whatsoever the conduct and business of the plaintiff under and by virtue of said Act, and from publishing any information as to the plaintiff and its business, under and by virtue of the said Act. And that each of the defendants show cause why a temporary and interlocutory injunction should not issue for the said relief prayed for, and such other and further relief as to this Court may seem meet and equitable in the premises.

II.

Your complainant further shows to this Honorable Court that the said Act is contrary to and in violation of the terms and provisions of the Constitution of the United States and of the State of Oregon, and is there-

fore void, as is more fully set out and explained in the bill of complaint herein filed.

III

That the defendants are continually threatening the plaintiff, its agents, employees and persons dealing with the plaintiff with arrest, and, unless restrained by the decree and injunction of this Honorable Court will continue to arrest the agents and employees of the plaintiff, and enforce the provisions of the said Act against the plaintiff, as is more fully set forth in the complaint on file herein.

IV.

That by reason of the said facts, and before notice could be given of a time and place for a hearing upon the application of the plaintiff for decree and temporary or interlocutory injunction, and before a hearing could be had and determined by three judges, the defendants will cause irreparable loss and damage to the plaintiff and its agents, as they threaten to do; and plaintiff, therefore, moves this Honorable Court for an order of this Honorable Court, directed to the defendants, and each of them, citing and requiring them to appear before this Honorable Court, and such other judges as this Honorable Court shall designate, at a time and place to be fixed, as provided by law, and show cause why a temporary or interlocutory injunction should not issue against them, and each of them, in the manner hereinbefore outlined.

And the plaintiff further moves and prays the Court to grant a temporary restraining order, continuing in

force and effect until the hearing and determination of the application for an interlocutory order, restraining the defendants, and each of them, in the manner that an interlocutory injunction is sought.

The attention of this Honorable Court is further called to the complaint on file herein, and to the affidavits hereto attached and made a part hereof by reference, wherein it is set forth that the plaintiff has built up in the State of Oregon a business valued at more than \$3000.00 a year, and maintains in the state of Oregon various agents and representatives in the various counties of Oregon; that the defendants have threatened these agents with arrest, and that the plaintiff finds it impossible to secure men of integrity to conduct its business by reason of the said facts, and that all of the agents and representatives of the plaintiff will leave its employ unless immediate relief is procurable; that the president of the plaintiff and three of its agents have been arrested, and have been released only upon bail.

V.

This motion is based upon the complaint, and upon the said annexed affidavits, the affidavits being attached for the purpose of showing the threats of arrest and the imminent danger of further arrests, and the risks that the plaintiff and its agents and representatives run in carrying on the business of the plaintiff, and the likelihood of further arrests, imprisonment and heavy penalties.

WILSON, NEAL & ROSSMAN,
Solicitors for Plaintiff.

AFFIDAVIT OF A. D. BAKER.

STATE OF OREGON,)
) ss.

County of Multnomah.)

I, A. D. Baker, being first fully sworn, upon my oath depose and say:

That I am the General Agent in the State of Oregon for the National Mercantile Company, Limited, the above named plaintiff, and have general charge of its business in the State of Oregon, and of its sub-agents.

That in the month of November, 1913, in the City of Portland, Oregon, I was arrested for a violation of Chapter 341 General Laws of Oregon for 1913, and charged with selling securities of the National Mercantile Company, Limited, in violation of the said Act; that since my arrest it has become practically impossible to do business in the State of Oregon for the National Mercantile Company, for the reason that the sub-agents of the plaintiff are being constantly threatened with arrest for a violation of the said Chapter 341, and there-upon leave the employment of the plaintiff, and for the further reason that the public in general refuses to deal with the plaintiff by reason of the action taken by the defendant R. A. Watson.

That at the present time the aggregate face value of contracts issued to people residing in Oregon is in excess of \$150,000.00, one loan of which, amounting to \$3000.00, was granted prior to the enforcement of the said Chapter 341.

(Sg) A. D. BAKER.

Subscribed and sworn to before me this 20th day of
April, 1914.

(Seal)

GEORGE ROSSMAN,
Notary Public for Oregon.

AFFIDAVIT OF GEORGE E. STILLINGS.

DOMINION OF CANADA,)
) ss.
Province of British Columbia.)

I, George E. Stillings, being first duly sworn, upon my oath depose and say:

That I am President of The National Mercantile Company, Limited, plaintiff named; that the general representative of the plaintiff in and for the State of Oregon is one A. D. Baker, residing at Portland, Oregon; that the said A. D. Baker, upon our behalf, appoints other representatives throughout the State of Oregon to take applications for loans, and deliver contracts for loans to such prospective borrowers; that on or about the 13th day of November, 1913, in the City of Portland, Oregon, a warrant was issued for the arrest of the said A. D. Baker for offering for sale securities of The National Mercantile Company, Limited, in violation of Chapter 341, General Laws of Oregon for 1913, which securities consisted in the contracts of The National Mercantile Company, Limited, and said A. D. Baker was then taken into custody, and obtained his release only upon depositing with the Clerk of the District Court, Multnomah County, Oregon, the sum of Five Hundred Dollars (\$500.00) cash bail.

That on or about the 22nd day of November, 1913, I was likewise arrested in the City of Eugene, Lane County, Oregon, for a violation of the said Chapter 341 General Laws of Oregon for 1913, which violation of said law, as stated in said warrant for arrest consisted in offering for sale such securities of The National Mercantile Company, Limited, and was only released from arrest, after having been incarcerated in jail, upon the deposit of One Thousand Dollars (\$1000) cash with the proper authorities of Lane County, Oregon; that at the time of my arrest, C. G. Hune and O. Sundburg, local representatives of The National Mercantile Company, in Lane County, Oregon, were arrested for similar offenses.

That by reason of these various arrests the business of The National Mercantile Company, Limited, in Oregon has been greatly interfered with, and, unless some immediate relief is procured, will be completely destroyed.

That the National Mercantile Company has spent a very large sum of money in Oregon in advertising its plan of business and placing the same before the public, and has thereby secured a valuable good will and a large list of customers, and that large numbers of people are now ready to sign with it applications for loans and borrow money upon its plan of procedure, but that the agents and the representatives of said company hesitate to file these applications, by reason of the aforementioned arrests, and further arrests made by various district attorneys and by Corporation Commission R. A. Watson.

That prior to said arrests, The National Mercantile Company had representatives in seventeen counties in the State of Oregon, and the said Company was doing a large and profitable business; that, as a result of said arrests and threats of further arrests, the said representatives have become afraid to prosecute their business, and have either abandoned the same entirely, or are awaiting some assurance from the Courts that the said Act is not applicable to the business of The National Mercantile Company, as set out in the Complaint, or is unconstitutional and void, and it is impossible to secure good, reliable representatives who will take the chance of being arrested and incarcerated in jail for a violation of the said Act.

That, on or about the 20th day of November, 1913, the said A. D. Baker and I called upon the Corporation Commissioner, R. A. Watson, at his office in Salem, Oregon, to make inquiry in regard to the said Act, and to explain to him wherein the same is unconstitutional and void; that said Watson became very insolent and arbitrary, and refused to listen to reason, and thereafter, and upon the subsequent day, caused my arrest, and since said day has constantly threatened with arrest the representatives of The National Mercantile Company, and has in every way possible, by publications in the newspapers and otherwise, interfered with and obstructed the business of the said National Mercantile Company, above mentioned plaintiff; that by reason of the conduct of the said Watson and the various district attorneys of Oregon, the business of The National Mercantile Company, Limited, in Oregon has been and

is being greatly damaged, and, unless immediate relief is forthcoming, will be entirely destroyed.

(Sg) GEORGE E. STILLINGS.

Subscribed and sworn to before me this 20th day of April, 1914.

(Seal)

GEORGE ROSSMAN.

AFFIDAVIT OF W. B. BOYER.

STATE OF OREGON,)

) ss.

County of Multnomah.)

I, W. B. Boyer, being first duly sworn, upon my oath depose and say:

That I am a resident and property owner in the State of Oregon, and am a married man.

That I am an agent of the National Mercantile Company, Limited, the above named plaintiff, and have been an agent of the plaintiff for the year last past.

That by reason of the enforcement of the Blue Sky Law, being Chapter 341 General Laws of Oregon for 1913, it has become extremely difficult to sell the contracts of said plaintiff, and by reason of the publicity given in the press by the actions of R. A. Watson, Corporation Commissioner for Oregon, concerning the plaintiff, a suspicion has been aroused in the minds of the public concerning the plaintiff, and people hesitate and refuse to have anything to do with the plaintiff.

That prior to the action taken by the said R. A. Watson the contract holders of the plaintiff were all satisfied with their business relations with the plaintiff,

and were all willing to proceed therewith; but, owing to the action taken by the said R. A. Watson, many of the contract holders have become dissatisfied, and many of them have allowed their contracts to lapse, thus injuring not only themselves and the plaintiff, but the other contract holders in the same series.

That I have secured applications for approximately \$30,000 worth of contracts with the plaintiff; that I am satisfied if relief is at once forthcoming confidence will again be restored in the minds of the contract holders, and the business of the plaintiff will proceed without any further loss.

That the said R. A. Watson, Corporation Commissioner of Oregon, has written letters to various people who are contemplating purchasing contracts of the plaintiff, advising them not to purchase, and that any purchase would be in violation of the said Blue Sky Law of Oregon, and that the said Watson would not consider such contracts a safe investment, by reason of which fact such purchasers have refused to deal with the plaintiff; that I have seen two of such letters, and know that the contents of the same are as aforesaid.

That, unless immediate relief is forthcoming, the business of the plaintiff will be greatly impaired in the State of Oregon, and it will become so unprofitable that I will leave the employ of the plaintiff.

W. B. BOYER.

Subscribed and sworn to before me this 22nd day of April, 1914.

O. A. NEAL

Notary Public for Oregon.

AFFIDAVIT OF E. M. BORNE.

STATE OF OREGON,)
) ss.

County of Multnomah.)

I, E. M. Borne, being first duly sworn, upon my oath depose and say:

That I came into the employ of the plaintiff as an agent in the Kenton, Oregon, District, on or about Aug. 2, 1913, and have been in their employ ever since said date; that in the course of my employment I solicited applications for loans from various residents in the Kenton District, and have secured contracts for loans, as face value of contracts, amounting to approximately \$25,000; that all of the said contract holders, except one, are satisfied with their business relations with the plaintiff.

That the publicity given to the prosecutions of the agents of the plaintiff has made it practically impossible to do business in Oregon for the plaintiff, and it is becoming more difficult each day to do business for the plaintiff; that by reason of the said publicity people hesitate to accept the contracts from the plaintiff, and that, unless immediate relief is forthcoming it will become absolutely impossible for the plaintiff and its agents to do business in Oregon.

(Sg) E. M. BORNE.

Subscribed and sworn to before me this 21st day of April, 1914.

(Seal)

GEO. F. HOPKINS, JR.,
Notary Public for Oregon.

AFFIDAVIT OF AMANDUS BUTCHER.

STATE OF OREGON,)

) ss.

County of Linn.)

I, Amandus Butcher, being first duly sworn, say: That I am an agent of The National Mercantile Company, Limited, the above named plaintiff; that the Corporation Commissioner of the State of Oregon has notified me that this Company is illegal under what is generally known as the Blue Sky Law of Oregon, which I understand to be Chapter 341 of the General Laws of Oregon for 1913, by reason of which fact I have hesitated to secure business for the said National Mercantile Company, Limited, as shown by such notification hereto attached and made part of this affidavit.

That a short time ago I secured applications for three contracts in The National Mercantile Company, Limited, and the payment of the application fee, and, when I was about to turn over the contracts for loans to applicants, they refused to accept the same by reason of the publicity which has been given the threats to arrest under the said Blue Sky Law, and I was compelled to keep the said contracts and return to applicants the payments which were made thereunder.

AMANDUS BUTCHER.

Subscribed and sworn to before me this 21st day of April, 1914.

A. D. HALL,

(Notarial Seal)

Notary Public for Oregon.

R. A. Watson,
Corporation Commissioner.

STATE OF OREGON

Corporation Department.

Salem, April 13, 1914.

Amandus Butcher,

1206 E. First Street, Albany, Oregon.

Dear Sir:

This acknowledges yours of April 11, in reference to the NATIONAL MERCANTILE COMPANY, LIMITED.

This Company has not entered the State of Oregon as a foreign corporation, nor has it complied with Chapter 341, G. L. 1913, the Blue Sky Law. It has no lawful right to transact business in the State. At the request of this department prosecutions have been commenced against the agents of the company at Portland and Eugene. The president of the company is under bonds in Lane County also, for having violated the Blue Sky Law.

Trusting this will give you the information you desire, I am,

Yours truly,

R. A. WATSON.

(Envelope)

After 5 days, return to
CORPORATION DEPARTMENT,
Salem, Oregon.

SALEM (Stamp)
April 13-14
6-30 PM
OREGON

Mr. Amadus Butcher,
1206 E. First Street,
Albany, Oregon.

**AFFIDAVIT OF GEORGE E. STILLINGS
AND A. D. BAKER.**

STATE OF OREGON,)

) ss.

County of Multnomah.)

We, George E. Stillings, President of the plaintiff corporation, and A. D. Baker, State Agent for the plaintiff corporation in the State of Oregon, being first duly sworn, on oath say:

That on or about the month of October, 1913, the said A. D. Baker appointed C. G. Hune and O. M. Sonberg, of Eugene, Oregon, sub agents for plaintiff corporation at Eugene, Oregon; that offices were opened up by said agents, printed matter explaining the plaintiff's plans of conducting business was forwarded by the plaintiff company to said agents at Eugene, Oregon, all of which entailed a great deal of expense and labor upon the part of the said plaintiff company; that said agents proceeded to conduct the business of the plaintiff company in said locality, and had succeeded in selling contracts amounting to approximately \$40,000.00, and in various ways prosecuted the business of the plaintiff vigorously, and established a good will and good name for the plaintiff in said locality; that all contract holders in the said locality, as well as in other parts of Oregon, were satisfied with their contracts and their relations with the plaintiff company; that shortly thereafter R. A. Watson, Corporation Commissioner of the State of Oregon, began to prosecute and obtained the arrest of the said Sonberg and Hune, and

to send out literature notifying the contract holders that the plaintiff company was not authorized to do business in the State of Oregon, and advertised same in the public press, for the purpose of making it impossible for the plaintiff company to do business in the State of Oregon; that thereupon the said business in Eugene, Oregon, as thus built up, was ruined and lost to the plaintiff, and the said agents quit their employment, and that said agents were humiliated, and on account of repeated threats of arrest left the said locality, and refused to continue in the service of the plaintiff, and the good name and business repute of the plaintiff company was questioned.

That by reason of the continued threats of arrest and interference with the plaintiff's business, by the said Corporation Commissioner, the plaintiff's business in the State of Oregon, has been greatly injured and interfered with, and damaged in other localities in the State; that if the defendants herein are not restrained from enforcing said Act, Chapter 341 of the General Laws of Oregon of 1913, known as the Blue Sky Law, the plaintiff's business in the State of Oregon will be absolutely broken up, and the plaintiff will suffer irreparable damages.

That owing to the fact that the loans which are made by the plaintiff are made on a co-operative plan between its contract holders, and owing to the fact that the said repeated attacks upon the plaintiff and the said publicity, and the said question of the business repute of the plaintiff by said R. A. Watson, all of which is without foundation, the contract holders of the plaintiff

are becoming discouraged, and are losing confidence in the plaintiff, and many of them are allowing their contracts to lapse, which said fact makes it slower for the loan fund of each group of one hundred borrowers to accumulate, and thereby the contract holders of the plaintiff are injured and compelled to wait longer for their loans, thereby not only injuring the plaintiff but also the contract holders of the plaintiff in the State of Oregon.

That there are now in force in the State of Oregon contracts with residents of Oregon calling for loans amounting to the sum of \$150,000.

(Sg.) GEORGE E. STILLINGS,

(Sg.) A. D. BAKER.

Subscribed and sworn to before me this 22nd day of April, 1914.

(Seal)

GEORGE ROSSMAN,

Notary Public for Oregon.

AFFIDAVIT OF GEORGE E. STILLINGS.

STATE OF OREGON,)

) ss.

County of Multnomah.)

I, George E. Stillings, being first duly sworn, upon my oath depose and say:

That I am President and General Manager of The National Mercantile Company, Limited, the above named plaintiff; that the said corporation is duly incorporated, organized and existing under and by virtue of the Joint Stock Companies Act of British Columbia,

Canada, and is subject to, and operates under, the Trust Companies Act of British Columbia, which requires sworn reports to be made of the company's affairs, giving assets and liabilities, to the Minister of Finance, through chartered accountants, quarterly; and that any contract holder at any time may come to our office and, at his convenience, inspect the books, records and documents of the said plaintiff, and that any other person, upon the payment of 25c, has the same privilege.

That the plan of business adopted by the plaintiff is the same in principal as that of co-operative loan companies of England which have existed since the year 1850, one of which, The Royal Li-Ver Friendly Association, has disbursed in loans and benefits \$50,000,000.00, and has accumulated assets of \$16,250,000.00, and is at this time in active operation.

(Sg.) **GEORGE E. STILLINGS.**

Subscribed and sworn to before me this 22nd day of April, 1914.

(Seal)

GEORGE ROSSMAN,
Notary Public for Oregon.

**ORDER TO SHOW CAUSE WHY PRELIMINARY INJUNCTION SHOULD NOT
ISSUE.**

This matter coming on for a hearing before the Honorable Chas. E. Wolverton, on a motion of the above named plaintiff, by its attorneys, for a temporary restraining order for an injunction enjoining the defendants, and each of them, and all other persons, from

bringing directly or indirectly any proceeding in law or in equity for the enforcement of Chapter 341 General Laws of Oregon for 1913, which became effectual on or about the 3rd day of June, 1913, and which act is entitled: "An Act to protect purchasers of stocks and bonds and prevent fraud in the sale thereof; to create a Corporation Department to administer this and other laws relative to regulation and supervision of corporations and providing penalties for violations hereof"; and from in any way interfering with the plaintiff's business, its agents and representatives, by virtue of the said law; and from compelling the plaintiff to comply with the said law before it shall do business in Oregon; and from threatening the agents and representatives of the plaintiff with arrest under the provisions of the said law; and from arresting the agents of the plaintiff by virtue of the said law, and from bringing any action of any nature whatsoever against the plaintiff, its agents, employees and representatives, or against any other person, to prevent or hinder in any way the conduct of the plaintiff, its agents, employees or representatives, by virtue of the said law; and that an order to show cause issue herein upon application of the plaintiff, directed to the above named defendants, and each of them, requiring them to show cause why a temporary or interlocutory injunction should not issue, as prayed for in the bill of complaint and motion; and it being necessary that notice thereof be given before said application can be heard or determined to not only the defendants above named, but also to the Governor of the State of Oregon,

IT IS THEREFORE ORDERED that the defendants, and each of them, be and appear before the above named court, the District Court of the United States for the District of Oregon, sitting in the post office building in the City of Portland, State of Oregon, in said District, on the 28th day of April, 1914, at the hour of ten o'clock in the forenoon of said day, then and there to show cause, if any they have, why they and each of them should not be enjoined and restrained in the manner hereinbefore stated.

IT IS FURTHER ORDERED by this Court that a copy of this order, together with notice for the interlocutory injunction, be served forthwith, and at least five days before the date of hearing, upon the Governor and the Attorney General of the State of Oregon, and upon each and all of the defendants within named forthwith and within five days of the date of hearing.

(Sg.) CHAS. E. WOLVERTON,

Judge of the above entitled Court.

Let services be made by A. D. Baker.

CHAS. E. WOLVERTON,

Judge.

Motion, Affidavits and order Filed April 22, 1914.

A. M. CANNON, Clerk.

And afterwards, to wit, on the 28th day of April, 1914, there was duly filed in said Court, and cause AFFIDAVITS OF WILLIAM T. STEIN, RICHARD F. WINCH, WALTER A. SHEPPARD, WILLIAM O. WEBSTER, HARRY COWAN, JAMES G. TODHUNTER AND KNOX WALKEM, in words and figures as follows, to wit:

AFFIDAVIT OF WILLIAM T. STEIN.

Rogers Building, 428 Granville St.
Vancouver, Canada.

IN THE PROVINCE OF BRITISH COLUMBIA
COUNTY OF VANCOUVER.

In the Matter of the
National Mercantile Company, Limited.

I, William Thomas Stein, of the City of Vancouver, in the Province of British Columbia, make oath and say as follows:

1. That I am a Chartered Accountant and a member of the firm of Stein & Company carrying on business in the City of Vancouver.

2. That I am the Auditor of the Books of the National Mercantile Company, Limited, and have a full knowledge of their business.

3. That the said Company is conducting a legitimate and proper loan contract business in the City of Vancouver, and is paying all obligations strictly in accordance with the terms of its contracts and is living absolutely up to its contracts and is complying with all the regulations as required by the laws of the Province of British Columbia.

4. That said company is in good, solvent condition at the present time and has good financial standing and reputation in the City of Vancouver and pays all its accounts promptly.

5. I am personally acquainted with the Directors

R. A. Watson, Corporation Commissioner, et al. 187
and other officers of the National Mercantile Company,
and I believe that they are capable of properly carrying
on the business of the company and that they are per-
sons of good standing in this community.

WM. T. STEIN.

SWORN BEFORE ME at the City of Vancouver,
in the Province of British Columbia, this 23rd day of
April, A. D. 1914.

(Notarial Seal) LESLIE C. FORD,
A Notary Public for Taking Affidavits in the province
of British Columbia.

AFFIDAVIT OF RICHARD F. WINCH.

IN THE PROVINCE OF BRITISH COLUMBIA
County of Vancouver.

In the Matter of The
National Mercantile
Company Limited.

I, Richard F. Winch, of the City of Vancouver in
the Province of British Columbia, make oath and say as
follows:

1. That I am a Director of the firm of R. V. Winch
& Company, Limited, in Vancouver, Province of British
Columbia.

2. That the National Mercantile Company,
Limited, have for almost three years occupied office
space in the Winch Building, and they have been most
satisfactory and desirable tenants. They have always
promptly paid their rents, and have the reputation in

Vancouver of promptly meeting all their bills and obligations.

3. To the best of my knowledge and belief the officers of the National Mercantile Company, Limited, are capable and competent, and operate their business in an honourable and able manner, and their conduct has been such as to entitle them to the utmost confidence and respect.

R. F. WINCH.

SWORN BEFORE ME at the City of)
Vancouver, in the Province of British)
Columbia, this 24th day of April, A. D.)
1914.)

ABRAM H. COWHERD,

A notary Public for taking affidavits
in the Province of British Columbia.

(Notarial Seal)

AFFIDAVIT OF WALTER A. SHEPPARD.

IN THE PROVINCE OF BRITISH COLUMBIA
COUNTY OF VANCOUVER.

In the Matter of The National
Mercantile Company, Limited.

To Wit:

I, Walter A. Sheppard of the City of Vancouver in the Province of British Columbia, make oath and say, that I am assistant Manager of the Pacific Printers Limited (a body corporate with its registered office in the City and Province aforesaid) having power to grant

credit to our clientele and a knowledge of all business transactions with our customers.

That the National Mercantile Company, Limited, have done considerable business with us, and their account is marked (A1) on our ledgers; their liabilities always being promptly met in full when due.

Our business relations have always been very satisfactory.

That I personally have known Mr. G. E. Stillings for the past two years, during which time have transacted personal business, and to my entire satisfaction.

Declared before me at the City of Vancouver, in the Province of British Columbia this twenty-fourth day of April, A. D. 1914.

PACIFIC PRINTERS LTD.

W. A. Sheppard.

James B. Noble,

a notary public in and for the
Province of British Columbia.

(Notarial Seal)

AFFIDAVIT OF WILLIAM OSBORNE
WEBSTER.

579 Richards Street, Vancouver, B. C.

April 24, 1914.

I, William Osborne Webster, of the City of Vancouver, in the Province of British Columbia, make oath and say as follows:

1. I am Manager of the United Typewriter Co., Ltd., Agents for the Underwood Typewriter.

2. I have been doing business with the National Mercantile Co., Ltd., since October, 1912, and I have always found them prompt in their payments.

3. I am personally acquainted with Mr. G. E. Stillings, of the National Mercantile Co., Ltd., and as far as my knowledge of him goes, I regard him very highly.

Sworn before me, in the City of Vancouver, in the Province of British Columbia, this 24th day of April, A. D. 1914.

WILLIAM OSBORNE WEBSTER.

James Eadie

A notary public for taking affidavits in
the province of British Columbia.

(Notarial Seal)

AFFIDAVIT OF HARRY COWAN.

COWAN & BROOKHOUSE.

Commercial and General Printers.

421 Dunsmuir Street,

Vancouver, B. C., April 25th, 1914

IN THE PROVINCE OF BRITISH COLUMBIA
COUNTY OF VANCOUVER.

In the Matter of the National
Mercantile Company, Limited.

I, Harry Cowan, of the City of Vancouver, in the Province of British Columbia, make oath and say as follows:

1. That I am a partner of the firm of Cowan & Brookhouse, Printers & Publishers, in the City of Vancouver, Province of British Columbia.

2. That the said firm of Cowan & Brookhouse have for almost three years been doing printing work for the National Mercantile Company, Limited, and they have been most satisfactory and desirable clients, and have promptly met all obligations to us.

HARRY COWAN.

SWORN BEFORE ME at the City of Vancouver, in the Province of British Columbia, this 25th day of March, A. D. 1914.

N. R. ROBERTSON.

A Notary Public for taking affidavits
in the Province of British Columbia.

(Notarial Seal)

AFFIDAVIT OF JAMES G. TODHUNTER.

THE CLARKE & STUART CO., LIMITED
Stationers, Printers and Bookbinders.

Vancouver, B. C., April 24th, 1914.

IN THE PROVINCE OF BRITISH COLUMBIA
Re NATIONAL MERCANTILE COMPANY
LIMITED

1st. I, James G. Todhunter, of the City of Vancouver, in the Province of British Columbia, make oath and say, that I am a Director and Secretary-Treasurer of THE CLARKE & STUART CO., LIMITED,

and have full knowledge of our various customers, as to their accounts and business transactions with us.

2nd. That THE NATIONAL MERCANTILE CO. LIMITED have been doing business with us since August, 1911, and that their account has been considered by us to be one of the best, and same is always promptly paid when due.

3rd. That during our dealings with the NATIONAL MERCANTILE COMPANY LIMITED, our business has been executed under the most pleasant conditions.

Signature: J. G. TODHUNTER.

Declared before me at the City of)
Vancouver, in the Province of)
British Columbia, this twenty-)
fourth day of April A. D. 1914.)
(Notarial Seal)

John M. Lamey

A Notary Public in and for B. C.

AFFIDAVIT OF KNOX WALKEM.

IN THE PROVINCE OF BRITISH COLUMBIA
COUNTY OF VANCOUVER.

In the Matter of the
National Mercantile
Company, Limited.

I, Knox Walkem, of the City of Vancouver, in the Province of British Columbia, make oath and say as follows:

1. I am a member of the firm of Burns & Walkem,

and have been acting for several months as Solicitor for the National Mercantile Company, Limited.

2. The said Company has been carrying on a loan contract business in the City of Vancouver and elsewhere, and is in good standing in the Province of British Columbia and to the best of my knowledge is complying strictly with all of the Government regulations and conditions. As far as I am aware the company is in a good financial condition and has always promptly met its obligations.

3. I am also personally acquainted with the officers of the Company, and they are persons of good reputation in this City, and it has been their practice to consult my firm on all matters of legal importance in connection with the business of the Company, and they have carefully followed all instructions given to them.

4. I am informed and believe that the contract under which the company does business was carefully revised and passed upon by one of the largest and most reputable legal firms in the City of Vancouver, who gave it as their opinion that the same was perfectly legal and valid according to the laws of British Columbia.

KNOX WALKEM.

SWORN BEFORE ME at the City)
of Vancouver, in the Province of British)
Columbia, this 23rd day of April, A. D.)
1914.)

W. S. LANE,

A Notary Public for taking affidavits
in the Province of British Columbia.

(Notarial Seal)

DISTRICT OF OREGON,)

) ss.

County of Multnomah.)

Due service of the within Affidavits is hereby accepted in Portland, Multnomah County, Oregon, this day of April, 1914, by receiving a copy thereof, duly certified to as such by George Rossman, Attorney for Plaintiff.

JOHN M. PIPES,

Attorney for Defendants.

Filed April 28, 1914. A. M. Cannon, Clerk.

And afterwards, to wit, on the 28th day of April, 1914, there was duly filed in said Court and cause an **AFFIDAVIT OF A. DOWD**, in words and figures as follows, to wit:

AFFIDAVIT OF A. DOWD.

No.....

STATE OF OREGON,)

) ss.

County of Multnomah.)

I, A. Dowd, being first duly sworn, upon my oath depose and say, that on or about the 21st day of April, 1914, I wrote a letter to R. A. Watson, Corporation Commissioner of the State of Oregon, inquiring in regard to the contracts for loans offered for sale by the National Mercantile Company in the State of Oregon,

R. A. Watson, Corporation Commissioner, et al. 195
a copy of which letter is attached hereto and marked
Exhibit "A."

That on or about April 23rd, 1914, I received from
the said R. A. Watson a letter in reply to said letter
dated April 21, 1914, which said reply is hereto attached
and marked Exhibit "B," and is the identical letter
which covered his reply to my inquiry.

A. DOWD.

Subscribed and sworn to before me this 27th day of
April, 1914.

(Seal)

GEORGE ROSSMAN.

Notary Public for Oregon.

EXHIBIT "A"

Portland, Oregon, April 21, 1914.

Mr. R. A. Watson,

Salem, Oregon.

Dear Sir:

Having on hand an old pamphlet of the National
Mercantile Company of Vancouver, B. C., who sell Con-
tracts, and on reading same, I became very interested
in their plan; but first would like to ascertain their
standing in the State.

I am thinking of taking out a \$5000 Contract, but
as I work hard for my money I would like to make sure
that it is a safe investment.

Thanking you in advance, I beg to remain,

Yours very truly,

(Signed) A. DOWD.

EXHIBIT "B"

R. A. Watson,

Corporation Commissioner.

STATE OF OREGON,

Corporation Department.

Salem

April 22, 1914.

Mr. A. Dowd,

387 North Grande Avenue,

Portland, Oregon.

Dear Sir:

This acknowledges yours of April 21, in reference to the National Mercantile Company, Limited. This company is not of record in this state. It has not complied with the law in any manner, and refuses so to do. In my opinion, it is an unsafe investing medium. Your returns depend absolutely upon the discretion and the honesty of the officers. The reports that have been received in reference to the company are not good, and I would suggest that you exercise very diligent caution in having anything to do with it.

Very sincerely,

R. A. WATSON.

AFFIDAVIT OF R. A. WATSON.

STATE OF OREGON,)
) ss.
County of Multnomah.)

I, R. A. Watson, being first duly sworn, depose and say:

1. That I am a citizen and resident of the City of Salem, County of Marion, and State of Oregon; that I am by virtue of the provisions of Chapter 341 General Laws of Oregon for 1913, and by appointment of the Governor of Oregon, the duly appointed, qualified and acting Corporation Commissioner of the State of Oregon; that I am one of the parties defendant in the case of the National Mercantile Company, Limited, vs. the State of Oregon, et al., now filed and pending before the United States Court for the District of Oregon.

2. That I verily believe and therefore so allege it would be inequitable, unjust, unwise and against public policy that a temporary restraining order or injunction, or any order or injunction at all, issue out of the said court and be directed against the said parties defendant, or any of them, restraining and enjoining them, or any of them, from administering and enforcing any or all of the provisions of the said Chapter 341, General Laws of Oregon for 1913, or any other statute of the State of Oregon, as against the said National Mercantile Company, Limited, for the following reasons, to wit:

A. Because the nature and plan of the business

conducted by the said National Mercantile Company, Limited, is unsafe, unsound, inequitable to and a fraud upon the purchasers of the loan, saving, building, saving and loan, building and loan, or other contracts or securities by the said company issued, offered for sale and sold, and therefore should not be permitted to be operated against, and in the face of, the laws of the State of Oregon by virtue of an order of the said court.

B. Because I verily believe and therefore so allege that the National Mercantile Company, Limited, is to all practical intents and purposes formed upon and operated under the same plan as was the Tontine Mercantile Company, a Missouri corporation, and the Preferred Mercantile Company of Boston, a Massachusetts corporation, the fraudulent and criminal history of which is given in 82 Southwestern Reporter 1075, and in 187 Massachusetts Reports 516, and in "The Legal History of the Preferred Mercantile Company," a copy of which is hereto attached as a part of this affidavit and marked Exhibit "A."

C. Because George E. Stillings, promoter, president and managing director of the National Mercantile Company, Limited, as I verily believe and therefore so allege, was the promoter and managing head of the two companies named in Paragraph B above written; that his operations conducted under the name and guise of the above named companies were fraudulent and criminal and so adjudged to be, and that because of the great similarity between the business of the above named companies and that of the National Mercantile Company, Limited, I believe and therefore so allege, that the busi-

ness and operations of the National Mercantile Company, Limited, are fraudulent and against the peace and dignity of the State of Oregon and of the United States, and should not therefore be permitted by order of the court, and that in support of these allegations are offered the decision of the Supreme Court of Missouri in the case of the State ex rel Hickman, Supervisor of Building and Loan Associations vs. Preferred Mercantile Co. et al., as reported in 82 Southwestern Reporter 1075, and the decision of Supreme Judicial Court of Massachusetts, as reported in 187 Massachusetts 516, Exhibit "A" hereunto attached, and Exhibit "B" hereunto attached and made a part of this affidavit.

D. Because I am informed and believe, and therefore so allege, that the said George E. Stillings was charged before the United States District Court of Boston, Mass., with operating a lottery and using the mails to defraud, and was in the said court convicted in December, 1905, and was thereafter by the said court sentenced to serve one year in the Suffolk County Jail for the said offenses, wherefore he is not entitled to an order from this honorable court which will permit him to do the same things for which he was convicted and punished by the United States Court of Massachusetts, and that in support of these allegations I offer Exhibit "C," hereunto attached and made a part of this affidavit.

E. Because the National Mercantile Company, Limited, and George E. Stillings, its president, have in the past refused, and do not still refuse, to abide by or comply with any of the laws of the State of Oregon enacted for the control and regulation of similar com-

panies and officers and directors thereof, and should not therefore be heard to ask that the enforcement of these laws be restrained as to them, and in support of this allegation I offer Exhibit "D," hereunto attached, and made a part of this affidavit.

F. Because of the fact that the Corporation Department of the State of Oregon was created by Chapter 341, General Laws of Oregon for 1913; that the said Chapter became effective June 3, 1913; that ever since that date, and now, all investment companies and all corporations, joint stock companies and associations, domestic and foreign, doing business in the State of Oregon have transacted all business and have done all things required to be transacted or done, in so far as these related or relate to the incorporation, dissolution, conduct, supervision and regulation of such companies, corporations or associations, by the State of Oregon, with and through the said department, and the Corporation Commissioner.

G. Because of the fact that as a result of such procedure many corporations have been formed; that upon the basis of such incorporations vast issues of securities have been authorized, negotiated and sold, vast tracts of land have been transferred, and innumerable transactions of great import effected, the legality of which would be thrown into unnecessary and serious question should the honorable court cloud the integrity of the Corporation Department by an order restraining its operation at this time.

H. Because the facts do not warrant nor the necessities of the case at bar demand the issuance by the

honorable court of a temporary restraining order or injunction, or of any restraining order or injunction, directed against the parties defendant, or any of them, in order that full equity and justice may be obtained by the plaintiff company, but that on the contrary the corporate interests and the public policy of the State require that no such order shall be issued.

3. And the affiant further states that the plaintiff has not filed heretofore with the Secretary of State, or with this affiant as Corporation Commissioner of the State of Oregon, either under the provisions of Section 6727 of Lord's Oregon Laws, Volume III, page 2414, or Section 8 of Chapter 341 General Laws of Oregon for 1913, any written declaration of its desire and purpose to engage in business within the State of Oregon, and has not paid the sum of Fifty dollars to the said Secretary of State, or to this affiant as Corporation Commissioner, required by said law, or the annual license fee required by said law, or any part thereof; and that the plaintiff has not filed with the Secretary of State, or with the affiant as Corporation Commissioner, its power of attorney appointing some person, a citizen of the United States and a citizen and resident of this State, as attorney in fact for plaintiff, or authorized or empowered any such attorney to accept service of all writs, process, and summons requisite or necessary to give complete jurisdiction of the plaintiff to any of the courts of the State of Oregon or the United States courts therein, or to appoint such authorized agent upon whom lawful and valid service may be made of all writs, process and summons in any action, suit or proceeding against or

by the plaintiff in any of the said courts; and has not filed with the Secretary of State, or with this affiant as Corporation Commissioner, a certified copy of its charter or Articles of Incorporation, either certified by the legal keeper of the original, or otherwise; and by reason of the premises the plaintiff is not, and has not at any time been entitled to transact any business within the State of Oregon, and is not entitled to maintain this suit.

And in this connection affiant further says that he did, as Corporation Commissioner, notify the plaintiff and the said Baker to comply with the provisions of the law hereinbefore referred to, and furnished them with the necessary blanks for such compliance, but that the plaintiff has not complied with the law. And in order to apprise the Court of the true facts in relation thereto, the affiant attaches hereto copies of the correspondence between the affiant and the plaintiff in relation thereto, and makes the said copies of letters a part of this affidavit, marking them:

Exhibit "E," letter of affiant to the plaintiff, dated August 18, 1913.

Exhibits "F" and "G," letters of the plaintiff to affiant, dated August 21, 1913.

Exhibit "H," a letter in reply to the last two letters written by plaintiff, written by the affiant on August 25, 1913.

R. A. WATSON.

Subscribed and sworn to before me, this April 27, 1914.

(Seal)

V. L. GIBSON,
Notary Public for Oregon.

Exhibit "A."

**LEGAL HISTORY
OF THE
PREFERRED MERCANTILE COMPANY**

Once of

KANSAS CITY, MISSOURI, late of BOSTON,
MASS., briefly of WASHINGTON, D. C., and
finally of NEW YORK.

By

BURTON PAYNE GRAY, Receiver

August - 1905.

OFFICE OF THE RECEIVER
THE PREFERRED MERCANTILE COM-
PANY OF BOSTON,
704 Tremont Building,
Boston, Mass.

To Contract Holders of The Preferred Mercantile Co.,
of Boston:

Daily I am in receipt of inquiries from the holders of contracts in this Company and so numerous are they becoming and so general is the desire expressed for full information regarding the Company that I have prepared the following report, incorporating in it attested copies of the several court papers and records that throw light upon the methods employed by the promoters, George E. Stillings and Guy C. Stillings.

The Stillings brothers came to Massachusetts from

Kansas City, Missouri, early in the fall of 1903, where for three years or more they had operated The Preferred Tontine Mercantile Company of Missouri. In 1903 the Attorney General of Missouri brought an action against The Preferred Tontine Mercantile Company seeking to restrain the Company from doing business in that state. A report of those proceedings is found in an opinion of the Supreme Court of Missouri rendered July 1, 1904, and reported in 82 Southwestern Reporter 1075. This decision held that the business of the Company was in violation of the laws of Missouri, and ordered the appointment of a receiver.

In addition to the proceedings by the State of Missouri, the United States Postal authorities issued a Fraud Order which denied the Company the use of the United States mails.

Driven from Missouri the Stillings brothers came to Boston and on November 11, 1903, organized a corporation under the laws of the Commonwealth of Massachusetts called The Preferred Mercantile Company of Boston, the general scheme being practically the same as that of The Preferred Tontine Mercantile Co. of Missouri.

Very shortly the United States Postal authorities began an investigation of the business and on March 25, 1904, issued a Fraud Order against The Preferred Mercantile Company of Boston and its officers and agents. On September 14, 1904, additional Fraud Orders were issued against George E. Stillings, Guy C. Stillings, J. F. Knisely and L. H. Kendall, Winthrop Building, Boston, and forty-seven agents who conducted

branch offices throughout the United States. On February 10, 1905, another Fraud Order was issued against G. E. Walke, Winthrop Building, Boston, through whom the Stillings brothers were receiving their mail and also against I. M. Walters, 15 Charles Street, Boston.

On March 28, 1904, the Stillings brothers brought a bill in equity in the Circuit Court of the United States for the District of Massachusetts (No. 1950 Eq.) against George A. Hibbard, as Postmaster of the United States at Boston, for the purpose of restraining and enjoining him from withholding the payment of money others issued to The Preferred Mercantile Co. of Boston and praying that the Postmaster be ordered to deliver the Company's mail. Upon hearing this bill was dismissed by Circuit Judge Lowell on June 29, 1905.

On September 12, 1904, Guy C. Stillings was arrested for violation of the U. S. Rev. Laws Sec. 3894. On September 13, 1904, J. F. Knisely was arrested for the same offense and on September 17, 1904, George E. Stillings was also arrested, each being held in \$2,000 bail. November 3, 1904, all were indicted by the Federal Grand Jury and now await trial.

The Attorney General of Massachusetts on September 13, 1904, brought proceedings (case No. 9046, Equity) in the nature of Quo Warranto in the Supreme Judicial Court of the Commonwealth against The Preferred Mercantile Co. of Boston, alleging that the Company was engaged in an unlawful business and in violation of Revised Laws of Massachusetts, Chap. 73, ss. 7, 8. November 26, 1904, Mr. Justice Braley granted a tem-

porary injunction against the Company restraining its officers from disposing of any of the assets of the Company not in "the regular course of business," and reserved the case for the opinion of the full court. March 3, 1905, the Supreme Judicial Court rendered an opinion in the case (See 187 Mass. 516) declaring that the business carried on by the Company was illegal and on March 14, 1905, an order was duly entered forfeiting the Company's charter.

On behalf of all contract holders N. H. George of Emporia, Kansas, on March 24, 1905, filed a petition asking that the court appoint a receiver. On the day prior to the hearing on this petition, the Stillings brothers, through J. F. Knisely, their agent at Kansas City, purchased from Mr. George his contracts, with the result that this action was suspended. Thereupon the Attorney General brought an action praying for the appointment of a receiver. (Commonwealth of Massachusetts vs. The Preferred Mercantile Company of Boston, No. 9240 Eq.)

On March 30, 1905, I was appointed temporary receiver and at once took possession of the offices of the Company and made due demand of George E. and Guy C. Stillings for the funds and property of the Company. My demand was refused and, with the exception of \$14.06 and a few postage stamps found in the cash drawer, no assets were surrendered to me. On the same day the treasurer, Guy C. Stillings, drew \$8,000 of the Company's money from the New England Trust Company and gave it to George E. Stillings. (See Master's Report, post.)

On March 31, 1905, I called the attention of the Attorney General to the refusal of the Stillingses to deliver to me the Company's property and on the same day an Information of Contempt was filed against George E. Stillings and Guy C. Stillings. Both defendants were arrested and admitted to bail in the sum of \$10,000 each.

An examination of the Company's books revealed gross irregularities and on April 11, 1905, a second Information of Contempt was filed against George E. and Guy C. Stillings charging them with violation of the order of the court entered in case No. 9046 Equity.

By consent of all parties, both cases were referred to James D. Colt, Esq., special master, to hear the parties and report to the court the facts, together with a transcript of all the testimony in the case. The trial covered several weeks. On June 29, 1905, the master filed his report and on the 11th day of July the case was argued before Mr. Justice Barker of the Supreme Court and the 11th day of August the court made its finding, adjudging George E. Stillings and Guy C. Stillings guilty of wilful contempt in both cases. (See findings and decree, post.) In the first case the court imposed a sentence of one year's imprisonment in the common jail on each defendant and continued for sentence the second case until the first sentence shall have been served.

The accounts of the Company show it to have received from the contract holders between December 5, 1903, and March 14, 1905, the sum of \$101,402.75. Paid to mature contracts \$46,404.64 and charged to expense \$30,916.86, leaving a balance on hand of \$24,081.25.

On March 14, 1904, a new set of books was opened commencing with a balance of \$4,972.90. Between Saturday, March 12, 1904, and Monday, March 14, 1904, the difference between \$24,081.25 and \$4,972.90 or \$19,108.35 disappeared.

From March 14, 1904, to March 14, 1905, including the balance of \$4,972.90, the Company received from the contract holders \$494,047.21. Paid to mature contracts \$338,865.93 and charged to expense \$155,181.28, leaving in the treasury on March 14, 1905, the sum of \$104.39.

From March 14, 1905, to May 10, 1905, the Company collected from the holders of contracts the sum of \$12,530.03. This money was deposited in the New England Trust Company in the name of Guy C. Stillings and it was from this account that he paid George E. Stillings \$8,000 on March 30, 1905. When I learned of this account only \$26.92 remained. No part of this \$12,530.02 has been paid to me by George E. Stillings or Guy C. Stillings, except the \$26.92.

On August 15, 1905, I filed a suit in the Supreme Judicial Court against the Stillings brothers (Burton Payne Gray, Receiver vs. George E. Stillings, Guy C. Stillings and I. M. Walters) seeking to recover a judgment for large sums of money illegally disbursed and appropriated. This action will be tried during the coming winter.

After the contempt cases were heard and while the Judge of the Supreme Court was preparing his findings, the Stillings brothers organized a New York corporation, called the Preferred Mercantile Company of New

York, for the purpose of taking over the business of the Boston company of the same name.

The following court reports and decrees are printed herewith for your further information:

1. Decree appointing Receiver.
2. Report James D. Colt, Esq., Special Master.
3. Finding of Mr. Justice Barker on Information for Contempt filed in case No. 9240 Equity.
4. Finding of Mr. Justice Barker on Information for Contempt filed in case No. 9046 Equity.
5. Decree of sentence for contempt in case No. 9240 Equity.

COMMONWEALTH OF MASSACHUSETTS.

Suffolk, ss.

Supreme Judicial Court

In Equity.

Commonwealth of Massachusetts

v.

The Preferred Mercantile Company of Boston.

INTERLOCUTORY ORDER.

This cause came on to be heard upon motion of the plaintiff and thereupon it is ordered that Burton P. Gray, of Boston, be and he is hereby appointed temporary receiver of all the property and effects of the defendant, including all moneys, books and papers, lists of contract holders of the defendant and copies of such lists and papers, and the defendant, its officers, servants and agents are hereby ordered to deliver to said receiver all such property, moneys, books and papers and lists

and copies thereof, and all moneys that shall arrive for the defendant, its officers, servants, or agents.

The said receiver is to give bond in the sum of \$5,000 within three days from this date, and is to hold the property as receiver until the further order of the court.

Leave is given to either party to apply for a modification or for further orders.

By the Court,
JOHN NOBLE, Clerk.

March 30, 1905.

COMMONWEALTH OF MASSACHUSETTS.

Suffolk, ss.

Supreme Judicial Court.

No. 9046 Eq.

In Equity.

Attorney-General

V.

George E. Stillings et al.

No. 9240 Eq.

Commonwealth of Massachusetts

V.

The Preferred Mercantile Company of Boston.

In the matter of two informations of contempt against George E. Stillings and Guy C. Stillings, one information being a part of No. 9046 equity, the other being a part of No. 9240 equity.

REPORT OF THE SPECIAL MASTER.

Pursuant to a rule of reference in each of the above-entitled cases ordering me to hear the parties and their evidence, to find the facts and forthwith to report the same to the court, together with such portions of the

evidence as either party may request, I submit my report:

George E. Stillings and Guy C. Stillings are respectively president and treasurer of The Preferred Mercantile Company of Boston, a Massachusetts corporation which was organized November 11, 1903, under chapter 437 of the Acts of 1903. The chartered purpose was "conducting and carrying on the business of dealing in diamonds, buying, leasing and selling the same, acquiring such real and personal estate and other property as the interests of the corporation may require, and doing all things which may be useful or incidental to such purposes or convenient or necessary for the carrying on of said business."

The sole business of the corporation has been to issue to the public installment contracts which were the same discussed in the opinion of the Supreme Court in *Attorney-General v. The Preferred Mercantile Company of Boston*, 187 Mass. 516. The contracts issued by the corporation were all in substantially the same form. According to their terms the applicant is required to pay one dollar on the delivery of the contract, and one dollar per week thereafter until the sum of \$110 is paid in, by which the contract becomes fully paid or reaches its maturity; if there is a default in his payments he shall forfeit twenty-five cents per week for each week that he is in default, and if he continues in default for five consecutive weeks, the lease shall be void and he shall forfeit all the sums paid. Of each dollar, the corporation is to use seventy cents, together with the money received from lapses, fines and transfer fees, for the

redemption of the contracts; ten cents for the contingent fund, which is used also for the redemption of contracts, but goes exclusively to redeem the oldest unredeemed contracts in their order. The remaining twenty cents, together with the difference between the retail value and the wholesale price of diamonds which are delivered in the redemption of contracts, may be used for defraying the expenses of managing the business. The corporation agrees to redeem as many of the oldest outstanding unredeemed contracts as the funds will permit each week, by the delivery of a commercial, white, clear and flawless diamond of the alleged value of one hundred dollars per carat. The right is reserved to redeem a contract at any time before maturity by delivering a diamond of weight proportionate to the number of weeks which the contract has to run; that is, if the contract is redeemed at or after maturity, the holder, having paid \$110, is entitled to a diamond of the alleged value of \$200; if the contract is redeemed at the expiration of eighty weeks, the holder is entitled to a diamond worth $80/110$ ths of \$200. The contract holder has no right to a redemption of the contract until the amount of money in the hands of the company to the credit of his contract, which must be the oldest outstanding contract of the series in which it is issued, equals \$200.

While the contract provides for its redemption by delivery of a diamond, the company has always promised in its circulars to redeem in cash, at the holder's option, by paying at the rate of \$160 for each fully paid or matured contract upon which \$110 would have been paid by the holder, and a proportionate amount upon

contracts redeemed before maturity. In fact, almost all redemptions have been in cash. During the year covered by the company's books, March 14, 1904, to March 14, 1905, the company expended for diamonds only \$2,-216.99, while it paid out in cash redemptions \$247,045.25. The introduction of the diamond into the scheme was a specious pretence devised to give the company a fancied security as an inter-state distributor of merchandise. Under this pretence it obtained its Massachusetts charter, which it advertised all over the United States as a guaranty of sound and conservative business principles.

The entire management of the corporation was delegated by the board of directors, consisting of George E. Stillings, Guy C. Stillings and a clerk, I Morton Walters, to George E. Stillings, who owned twenty-eight of its thirty shares of capital stock.

To appreciate the financial operations of the company under George E. Stillings' management it is important to state his previous adventures in the same line of dealings. From October, 1900, to October, 1903, he was carrying on, as president and general manager, the business of the Preferred Tontine Mercantile Company, a Missouri corporation having its home office in Kansas City, Missouri. That corporation, which I shall hereafter call the "Tontine Company," issued contracts of similar tenor to those of The Preferred Mercantile Company of Boston. The method of redemption was varied from time to time in an endeavor to keep in advance of the pursuing fraud orders of the Postal Department, the latest form issued by the Tontine Company differing in no essential particular from the form

of The Preferred Mercantile Company of Boston. The former were redeemed in the numerical order of their issuance; the latter in a numerical order purporting to be based upon the chronological order of the applications filed.

In 1902 and 1903, proceedings in equity instituted by the State of Missouri were pending against the Tontine Company, which terminated in a decree restraining the company, its officers and agents from removing its assets from the state, and ordering the appointment of a receiver. That case, upon appeal to the Supreme Court of Missouri, is reported in 82 S. W. Rep. 1075, date July 1, 1904.

Nevertheless, practically all the contract-holders continued to pay the installments according to the terms of their contracts, to George E. Stillings and agents of the company, pending the formation of the Massachusetts corporation, which thereupon issued its contracts in exchange for them, giving the holders credit for their payments to the Tontine Company, and giving to each his former place in the line reaching toward redemption. In brief, the Massachusetts corporation took over all the liabilities of the Tontine Company, leaving behind in Missouri all its assets except the current installment payments made after the decree of the Missouri court stopped the business of the Tontine Company. George E. Stillings' reason, when driven from Missouri, in choosing Massachusetts for his new charter was, that owing to the conservatism of this state and its rigid supervision and control over corporations, it seemed good to him to represent a Massachusetts corporation.

The contract-holders thus taken over from the Ton-tine Company were divided into three classes or series, called A, B and C. The earliest contracts were put into A, the next in order into B, and the latest into C. No certain number made up each series. This detail, as all others in the management of the business, depended upon the taste and fancy of George E. Stillings. The earliest contracts obtained by the Massachusetts corporation directly were classed in series C. When this series seemed large enough later contracts were put in series D. No contract of an earlier series was written after a later series had been started, but redemptions were made concurrently from all the series, the earliest contracts of each being entitled to redemption first.

The object of dividing the contracts into series was to enable the manager to encourage investors here and there by redeeming some contracts shortly after maturity, and, indeed, before maturity, under the right reserved in the contract. The distribution of installments derived from a later series to the holders in earlier series also furnished elasticity.

Aside from the 20 per cent. of each installment which went for expenses, and the penalties, fines and transfer fees which were devoted exclusively to the series in which they occurred, the distribution was as follows: 10 cents from every installment upon every contract in series B, C and D was put into the A redemption fund. One-half of the balance of every installment of B went into the A redemption fund. The rest of every installment of B and one-half of the balance of every installment of C went into the B redemption fund. The rest of

every installment of C and one-half of the balance of every installment of D went into the C maturity fund. There being no later series, only 35 cents out of each dollar paid by people in the D series went into the redemption fund of that series. Thus most of the money paid by persons who invested in the Massachusetts corporation went to redeem obligations incurred by the Tontine Company.

These four series are now outstanding, the total number of contract-holders being approximately five thousand, many of whom hold several contracts.

The story of the transfer of the business from Missouri to Massachusetts not only illustrates George E. Stillings' method of dealing with a court decree, but accounts for the large amount of business done by the Massachusetts corporation in a short time.

From December 5, 1903, the date of the first item on the company's books, to March 12, 1904, the books show receipts amounting to \$101,402.75, and expenditures of \$77,321.50, leaving a balance on hand of \$24,081.25. During that period the amount disbursed through the expense fund as the cost of managing the business was \$30,916.86. March 12, 1904, was Saturday. On March 14th the company opened a new set of books, starting them with a credit of only \$4,972.90, although the balance on hand the previous Saturday afternoon was \$24,081.25; thus \$19,108.35 passed out of sight. Attention was called to this early in the hearing, yet the respondents have offered no reasonable explanation of the disappearance of this money. I find both the defendants responsible for its disappearance, Guy

C. Stillings because he was treasurer of the corporation; George E. Stillings because all the money of the corporation, both of the expense and of the redemption funds, was under his control. This \$19,108.35 was money which should have been used in the redemption of contracts, since the sums charged as expenses up to March 14, 1904, exceeded 20 per cent. of the total receipts. It was an asset of the company and ought to have been turned over to the receiver if still in their possession.

From the date of opening the new set of books to the judgment of ouster was one year and a day, March 14, 1904, to March 14, 1905. The books show disbursements during that year as follows:

Redemption of A contracts.....	\$ 74,392.92
Redemption of B contracts.....	100,024.89
Redemption of C contracts.....	98,019.49
Redemption of D contracts.....	30,339.58
Contingent fund used also in the redemption of A contracts	35,984.56
Amount charged out through the expense fund	155,181.28
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Total expenditures.....	\$493,942.72

The total receipts, including the cash on hand at the beginning of the year, are shown to be \$494,047.21. The balance left on March 14, 1905, was \$104.39, divided among the various funds as follows:

A fund	\$ 3.25
B fund	32.71

C fund	46.82
D fund	21.71
Contingent fund	0.
Expense fund	0.

It is obvious that the money paid out through the expense fund far exceeds 20 per cent. of the receipts plus the profit on the \$2,216.99 worth of diamonds purchased by the company. The company, under the direction of George E. Stillings, systematically pursued the following method of swelling the expense fund. All the money received was kept in one bank account, the division among the various funds being made only on the books. From every installment paid in, exclusive of the first five on each contract, which went for agents' commissions, the company charged 20 per cent. to the expense fund, as authorized by the contract. The remaining 80 per cent. it distributed among the redemption funds of the various series and the contingent fund, as explained above. Then, each week it deducted 20 per cent. of this remaining 80 per cent. from the redemption funds, including the contingent fund, and put it into the expense fund. For example, assuming that a contract-holder paid his \$110, without fines; the local agent took \$5; the company took, first \$21, then, by its fraudulent system of bookkeeping, \$16.80 more, leaving in the redemption fund \$67.20. It cost the contract-holder, therefore, \$42.80 to get \$67.20 into the fund, where it should be used for the benefit of his own series, the series next prior to his, and the earliest outstanding series.

In the spring or summer of 1904 the Postmaster-General of the United States declared the business a

fraud and notified the company that all mail addressed to The Preferred Mercantile Company of Boston, George E. Stillings and Guy C. Stillings, would be stamped "Fraudulent" and returned to the sender. These three parties thereupon filed a bill in equity to restrain him from such action, which is still pending. They have been excluded from the use of the mails during all the intervening time, but have employed the express companies for bringing in the installments and the agents' weekly reports.

On August 30, 1904, George E. Stillings directed Guy C. Stillings to transfer the bank account in the American National Bank, which had theretofore been carried in the name of "Preferred Mercantile Company, Guy C. Stillings, Treasurer," to the name of "George E. Stillings." This transfer was made, but Guy C. Stillings, Treasurer, continued to draw checks upon the account. This was the only bank account which the company had at that time, and never, from August 30, 1904, to the present time, has the company's account been kept in its own name, but a continuous account has been kept of its funds upon a secret trust in the name of others, as this report will state.

On September 12, 1904, Guy C. Stillings was arrested by the federal authorities upon the charge of using the mails in pursuance of a scheme to defraud. He gave cash bail by drawing a check for \$2,000 on the bank account of the corporation, though not even in the expense fund was there \$2,000 at that time. On September 13, 1904, John F. Knisely, the Boston manager of the company, was arrested upon the same charge,

and another \$2,000 check was drawn upon the general funds of the company for his bail. On September 16, 1904, George E. Stillings was arrested upon the same charge, and another \$2,000 check was drawn upon the general funds of the company for the same purpose. \$6,000 was put back in the bank to take the place of the amount so drawn, on September 17, 1904.

This date, September 17th, is the last day that the account of The Preferred Mercantile Company was carried in the name of George E. Stillings. By his directions the account was transferred on the following Monday, September 19th, to the name of L. A. Dooley, meaning Laura A. Dooley, the assistant bookkeeper of the corporation. She, however, had no authority to draw upon it, such authority being confined to the two Stillings. The account was carried in her name until March 14, 1905.

On September 13, 1904, the Attorney-General filed in the Supreme Court of Massachusetts, No. 9046 law, an information in the nature of *quo warranto* against The Preferred Mercantile Company of Boston, seeking forfeiture of its franchise. This is the case which went to the full court and is reported in 187 Mass. 516.

At this time the respondents began the practice, which thereafter was continuous, of requiring the bank to certify all checks upon deposits of the company. The first certified check was that drawn for bail on September 12th. The check drawn for a similar purpose on September 13th was certified also, and after that date, which was the day of filing the information in the nature of *quo warranto*, all checks upon the account of the com-

pany standing in the name of L. A. Dooley were certified. Wide publication had been made of the fact that the bank account was carried in the American National Bank, by advertising facsimile checks of large amounts apparently paid to contract-holders. The respondents, fearing that the public authorities or the contract-holders might attach its account, although in the name of Dooley, took this means of reducing the corporation's balances to almost nothing.

At this time, the beginning of the litigation in the state court, I find that George E. Stillings was determined that no power should interfere successfully with the business, which was putting its "expense funds" within his control at the rate of more than \$150,000 a year. Writing a circular letter, as his habit was, for the instruction of the company's agents, he said, under date August 30, 1904, referring to the Missouri litigation,—“The battle has cleared up and left us stronger than ever.” Again, in a circular letter to his agents, under date September 17, 1904, he said:

“You and your patrons can rest assured that we will continue successfully for all time to come. We have always been able in the past to handle litigation of all kinds, and I am free to confess that the burden at this time rests very lightly upon us.”

On September 20, 1904, in a circular letter to agents in reference to the information of *quo warranto* filed September 13th, he wrote, after referring to the State's claim that the charter of the company had been violated,—

“We have taken steps today to be ready to conduct

and carry on The Preferred Mercantile Co. of Boston under any and all conditions that may arise, regardless of what those conditions may be; and inasmuch as it may become necessary for the contract-holders to surrender to us the present contract that they now hold, it is not a bad idea to begin preparing them in advance. The new contract that we shall issue, if issued, will call for identically the same amount of future payments, if any, as the old contract calls for, will retain the same position in the new company, under the same management, and will approximately be redeemed in the same length of time, and will remain in the same series. * * In the meantime, no business will be transacted in Massachusetts from this office, but will be transacted from the office of the new company. It will not be necessary, however, to remove our clerks or present location, and all of your business will be transacted direct to this office by express, the same as you are transacting it now. This plan will enable us, as you see, to continue making our redemptions promptly each and every week, with or without the restraining order granted against the company by the state.

In preparing your customers for this, you can begin now with the statement that we have made a decided improvement in the plan of business and are going to give all the old patrons the opportunity to exchange their old contract for a new one which you expect will be delivered to you at your office within the course of the next two weeks. An unsurmountable barrier will be built around the new corporation to make it absolutely secure from any attack pending our successful decision at this point.

Now, do not jump at any conclusions nor work up any imaginations. We know exactly what we are doing in this case, and if you will consult direct with us on any point which you do not understand, everything will run smoothly. * * *

One condition in the new contract is a provision providing a fund to meet and master unjust legislation and litigation. Our new charter will be more ironclad than ever, though the one we now have is perfectly so. 'Forewarned is forearmed,' and we are equal to the emergency. Pound away and attend strictly to business and we will do the rest, and, as before stated, give all your patrons from now on a hint that we are getting out an improved contract and that we will allow the old patrons the privilege of exchanging their old ones for the new ones.

These new contracts will be made out in advance, and as soon as we see that it is absolutely necessary to make the change we will forward them to you with instructions, and you can begin at once to deliver them. If you begin now preparing your patrons it will be an easy matter to accomplish the change.

Remember, we retain the same name, the same offices, and the new company will assume all the glory of the old with whatever has accrued. In the meantime, you can use your judgment about sending a copy of this communication to your sub-agents. I believe, however, that it is preferable to see them personally and explain the matter in as few words as possible. The numbers of the contracts will remain the same.

Be kind and gentle with the patrons, and always

remember that they cannot imagine or think things that you do not tell them.

* * * Make it a point to call and visit personally each and every patron that has been affected by the recent litigation. You can conscientiously assure them that they will lose nothing by keeping up their payments, and those that do lapse out will benefit those that stay in. * * *

Yours truly and confidentially,

G. E. Stillings,

President."

On September 23, 1904, in a private letter to J. Sam Brown, Nevada, Missouri, a contract-holder who had inquired about the litigation, he said:

"Replying to yours of the 17th inst. just received, will say that the business of The Preferred Mercantile Company of Boston will continue as heretofore, regardless of existing conditions or any conditions that may arise, court decisions, restraining orders or injunctions."

To another contract-holder, Charles J. Miller, Tonawanda, N. Y., he wrote, September 29, 1904:

"Business is continuing as usual and we have no doubts but that the litigation now in process will terminate in our favor. We do not know when a decision will be had in the case, but presumably within the next two months. In any event, the 'Preferred' will go on doing business as usual."

On October 12, 1904, he wrote a circular letter to the agency force of the corporation, as follows:

"We are pleased to notify you that arrangements are now fully completed by which we will be enabled to

cope with any arising conditions such as restraining orders or injunctions, and at the same time we will fully comply with the order of any court of competent jurisdiction. So there remains but one thing for our future success, and that is new business."

On November 26th the information in the nature of *quo warranto* was heard before Judge Braley and was reserved at the request of the company for the full court. On the same day the Attorney-General filed in the Supreme Court an information in equity, No. 9046 equity, against George E. Stillings, Guy C. Stillings, John F. Knisely and The Preferred Mercantile Company of Boston, defendants, alleging among other things that an information to forfeit the charter of The Preferred Mercantile Company was pending and that if that resulted in a judgment of ouster the officers of The Preferred Mercantile Company would be left with funds in their hands which ought to be administered under the control of the court by a receiver. Upon this information a preliminary injunction issued in the following terms:

"It is ordered and decreed by the court that The Preferred Mercantile Company of Boston, George E. Stillings, Guy C. Stillings and John F. Knisely, their agents and servants be enjoined from transferring, removing from the Commonwealth, or disposing in any way of the money or other property already received or which may be hereafter received by it or them or any of them in the course of the business of said Preferred Mercantile Company of Boston, except in the ordinary course of its business."

Of this injunction both George E. Stillings and Guy C. Stillings had knowledge on the date thereof, November 26, 1904.

Upon this preliminary injunction the information of contempt, entitled in the case No. 9046 equity, is based. While in general the business was conducted in the same manner after this injunction as before it, I find that the defendants George E. Stillings and Guy C. Stillings did the following acts by way of disposing of the money received by the corporation in the course of its business, and that these acts were not in the ordinary course of the business of the corporation.

1. They deposited the receipts of the corporation in the American National Bank in the name of L. A. Dooley.

2. They put the balances in the American National Bank standing in the name of L. A. Dooley out of the reach of legal process by certifying all checks drawn upon the account.

3. On December 15, 1904, they held a special meeting of the directors, at which the following votes, among others, were passed:

“Upon motion being duly made and seconded, it was voted the President of the corporation should draw a salary from time to time not to exceed (\$25,000) Twenty-five Thousand Dollars per annum. Ballots were duly prepared and cast, and the amendment duly adopted.

On motion, it was further voted that the President be empowered to increase the salary of any or all em-

ployes of the corporation from time to time as occasion demanded.

On further motion it was also voted that the acts of George E. Stillings as President and Manager of the corporation in placing the company's funds in the American National Bank in the names of G. E. Stillings and L. A. Dooley, in trust for the corporation be and hereby is ratified and approved."

At this meeting all the directors were present, namely, George E. Stillings, Guy C. Stillings and I. M. Walters.

4. In pursuance of the intention manifested in the above vote, that nothing should be allowed to accumulate in the expense fund, the defendants proceeded to get rid of the money, so that on March 14, 1905, the date of the forfeiture of the charter, the books show no balance in the expense fund.

November 26, 1904, the balance in all funds, \$5,-292.95; March 14, 1905, balance in all funds, \$104.39. November 26, 1904, balance in expense fund, \$1,953.31; March 14, 1905, balance in expense fund, 0.

Besides paying the running expenses of the Boston office, together with the salaries of Guy C. Stillings and the clerks, they disposed of the expense fund in the following ways:

(a) By turning over many thousands of dollars to George E. Stillings and Mrs. George E. Stillings. It was the custom for George E. Stillings to take at any time money from the expense fund in any amount. Checks were drawn to cash, the money was charged on the books to George E. Stillings, and that was the end

of it. He kept no accounts and took no vouchers. He had no salary, but treated the expense fund as his own. It is impossible to trace the disposition of it. He testified that he used it all for the best interests of the corporation, especially in traveling all over the United States establishing new agencies and entertaining patrons, present and prospective. Without intimating approval of this course of business, I hesitate to find this conduct in contempt of the injunction. It was his regular treatment of the corporation from the beginning, and had no apparent relation to the court decree. The decree being somewhat indefinite in its terms, I give him the benefit of the doubt.

(b). By purchasing contracts from their holders, paying for them out of the expense fund. The corporation, by instruction of George E. Stillings, would often purchase a contract before maturity by paying the profit for the week of its existence, according to the maturity table. This contract would then belong to the company, but since it did not look right for the corporation to hold and redeem its own contracts, the contract at its purchase would be transferred direct to the name of some clerk or agent of the corporation, and later would be redeemed out of the redemption fund and the money which redeemed it would be turned by the clerk or agent, its apparent owner, into the expense fund. Thus the expense fund was made to profit out of the redemption funds. Sometimes the company would redeem the same contract twice over, the second redemption being a plain theft from the redemption fund, as discussed below.

One purchase out of the expense fund was so plainly

a disposition of money out of the ordinary course of business that I speak of it by name and date. On March 14, 1905, the date the books were closed showing no balance in the expense fund, the corporation purchased from one C. J. Kendall his contract for its full redemption value, \$160, paying for it out of the expense fund. I find that this was done by instruction of George E. Stillings for the purpose of diminishing the funds of the moribund corporation, with intent on his part to redeem that contract later for the benefit of the expense fund of the new corporation which he expected would arise out of the assets of The Preferred Mercantile Company of Boston.

5. By instruction of George E. Stillings the corporation, out of the ordinary course of its business, which could only be known to the court as evidenced by the provisions in its contract, took from the redemption fund and put into the expense fund for disposition as above, large sums of money which ought to have been kept intact or paid out in the redemption of contracts.

It so disposed of its property by various means, as follows:

(a) After taking out 20 per cent. of the contract-holders' contributions for its expenses as authorized by the contract before the contributions were distributed to the various funds, the corporation transferred each week 20 per cent. out of each redemption fund and the contingent fund to the expense fund. The total amount so transferred from redemption to expense between November 26, 1904, and March 14, 1905, is \$21,341.92.

(b) It redeemed contracts standing in the name

of agents of the company to very large amounts. By such redemption the expense fund profited from the redemption fund by the difference between the amount of money paid in redemption and the amount of money given to the original contract-holders upon transfer to the agent.

(c) It redeemed contracts standing in the names of agents a second time for the benefit of the expense fund. For example: March 10, 1905, Guy C. Stillings redeemed contracts numbered B 2452-2455 by payment of \$640. The \$640, instead of being paid in this instance into the expense fund, was paid direct to George E. Stillings and has never been accounted for. These contracts had already been redeemed July 2, 1904.

December 17, 1904, it redeemed contracts numbered B 2733, 2734, by paying \$320 into the expense fund from the redemption fund. These had already been redeemed December 10, 1904.

December 17, 1904, it redeemed contract numbered A 2085 by paying \$160 from the redemption fund to the expense fund. This contract had already been redeemed November 12, 1904.

All the above contracts stood in the name of the clerk, I. Morton Walters.

6. George E. Stillings, both before and after the injunction, granted permission, or dispensation, as he called it, to agents to date back contracts from one to six months, so that the applications for them purported to be made long prior to their real date. The effect of this was to make the time of redemption, and consequently of profit to contract-holders, depend, not upon the terms

of the contract, but upon the arbitrary will of George E. Stillings. Since one's chance of redemption depends upon his contract being reached in order, to insert prior to his contract others which were issued six months later, is a gross violation of the contract. The redemptions of such antedated contracts which took place after the injunction were violations of the injunction.

The fact that some of these extraordinary acts which I have classified under the above six paragraphs, were done to some extent prior to November 26, 1904, as well as afterwards, does not, in my opinion, make them doings in the ordinary course of business.

Having discussed the violations of the injunction in No. 9046, Eq., I recur to the story of the defendants' acts which bear upon the decree of March 30, 1905, appointing the receiver of the corporation. At the point where I digressed to speak of the November 26th injunction in its chronological order, I left the defendant George E. Stillings preparing the minds of the company's agents for an adverse decision upon the *quo warranto* information.

After the reservation of this case for the full court the defendants organized a corporation under the laws of the District of Columbia, by name "The Preferred Mercantile Company of Boston," for the purpose of "taking applications for and issuing thereon diamond contracts, with full power to redeem them in their diamond or cash value." Of this corporation, which was stated in its articles of association to have its home office in Boston, but which I find was never admitted to do business in Massachusetts, George E. Stillings was president and Guy C. Stillings secretary and treasurer.

Under date of February 2, 1905, George E. Stillings wrote a circular letter to the agents, in which he said:

“Herewith enclosed find rubber stamp of The Preferred Mercantile Company of Boston, organized and incorporated under the laws of the United States, in the District of Columbia, Washington, D. C. Should you receive the following wire from us: ‘(Adverse decision. No appeal. Present company must stop. Change over.)’, then you can receive the regular payments from all contract-holders, giving them the regular receipt, by notifying them that the new company will issue them in due time (within thirty days) a new contract, which contract will be exactly the same as the present one, with all objectionable features as found by the court eliminated, and this stamp herewith enclosed must be imprinted then and thereafter upon all receipts and applications and all literature of the company that you give out.

While we fully expect a unanimous verdict in our favor, yet we refuse to take any chances as the case may hinge or turn upon some technicality. Again, while the case might be decided adversely, yet to our advantage, this plan is formulated in order that the business can continue uninterrupted regardless of which way the case is decided.”

George E. Stillings followed this letter by another circular letter to the agents, of the same date, in which he said:

“In reference to the rubber stamp sent you of The Preferred Mercantile Company of Boston, incorporated in the District of Columbia, Washington, D. C., I wish to say that if it becomes necessary to transfer the business

of the present company to that company on account of an adverse decision in our present case, that the contract in so far as the number of weekly payments and their amount and the general run of business is concerned, will remain the same, Contractholders in the present company will receive credit for the same number of payments in the new company that they have made in the old, will have a contract worded exactly the same as the present one; in fact will have exactly the same contract and the same position in the order of redemption that they now hold."

On February 15, 1905, George E. Stillings instructed the agents as follows:

"Should you receive the following wire, 'Adverse decision; present company cannot continue; change over.' Then in that event forward your collection reports made for the new company, stamped as per former instructions, to L. A. Dooley, 406 Winthrop Building, Boston, Mass., by express. * * * Address all communications for literature and supplies to I. Morton Walters, 404 Winthrop Building, Boston, Mass."

March 3, 1905, the rescript of the full court came down declaring the charter forfeited. On March 4, George E. Stillings wrote a circular letter to the agents, stating the substance of the decision and concluding as follows:

"If you receive a wire from us to 'change over' follow our former instructions in reference to the District of Columbia company, and forward everything by express thereafter until further notified to I. M. Walters, 402 Winthrop Building."

At the same time he caused to be published in the Preferred Monthly, a periodical containing news of the various agencies and commenting on the business, which was distributed among the contract-holders the following article:

“The Supreme Court of Massachusetts, full bench of five judges, sitting on the 3d instant, handed down a decision in an action brought by the Attorney-General of Massachusetts against ‘The Preferred Mercantile Company of Boston,’ wherein the Attorney-General undertook to have the business of that company adjudged a ‘lottery.’ The court was unanimous in its decision in favor of the defendant. It said * * *.”

Then followed that portion of the opinion of the court holding that the business was not a lottery, quoted as a full quotation of the opinion. The extract suppressed entirely the decision and so much of the opinion as was adverse to the company. After the extract purporting to be the full opinion the article went on as follows:

“This unanimous and broad-sweeping decision handed down by the full bench of the Supreme Court of Massachusetts, whose rigid supervision and jurisdiction over corporations are well known all over the entire world, in favor of The Preferred Mercantile Company of Boston, chartered and existing under the laws of Massachusetts, is a victory beyond explanation. The United States Postal Department officials have contended that in their opinion the business of The Preferred Mercantile Company of Boston was a lottery, which the company has ever contended that it was not,

and whose contention is now backed up by the Supreme Court of the most conservative state of the United States. The patrons of this company and its agents are to be congratulated upon having their interest allied with such an institution, and should give its management every support and encouragement and bring into the order as many of their friends and acquaintances as possible."

I find that this article was written, published and disseminated by George E. Stillings. This is but one illustration of his constant practice to keep the facts from the knowledge of the contract-holders. The agents were enjoined to tell the contract-holders no more than it seemed to George E. Stillings advisable that they should know.

This issue of *The Preferred Monthly* was sent out to the contract-holders enclosed in a circular written by George E. Stillings, calling attention to the discussion therein of the Supreme Court opinion, and saying:

"Desirous of keeping you fully informed from time to time of the improvements being made in diamond contracts, we beg to advise you that we will have something to communicate to you shortly that will beyond the shadow of a doubt meet with your hearty approval.

The Preferred Mercantile Company of Boston to and including March 11th paid its patrons, in satisfaction of diamond contracts, a total of over \$600,000. It operated its business in almost every state and territory of the United States and throughout all of Canada. Its business, like all others, is subject to being improved upon from time to time, and this communication is in

reference to improvements that we are now perfecting and of which we will send you more complete information a little later on."

On March 10, 1905, George E. Stillings issued a bulletin to agents, in which he said:

"In surrendering our old charter in order to make application for a new one, we of course cannot transact any more business under the old. However, your patrons can continue as before stated to make their payments for the proposed new company or they can withhold their payments until the new company is perfected. All those making their payments under the terms and conditions aforesaid, you are to forward them as usual by express to Guy C. Stillings, Room 402 Winthrop Building, Boston, Mass., until otherwise advised. The new company will be officered and managed by identically the same persons as the former one, and we will, without a doubt, have the most substantial, as well as attractive contracts ever yet offered the public and without making any radical changes from the old plan. Paid in full contracts will be exchanged without any additional expense to the holders thereof."

On March 14, 1905, the following judgment was entered of record in the *quo warranto* information, No. 9046 Law:

"JUDGMENT OF OUSTER.

And now, after rescript from the full court, it is ordered and adjudged that the defendant The Preferred Mercantile Company of Boston has violated provisions of law whereby it has forfeited its charter; and that it be

forever forejudged and excluded from the exercise of each and all of its privileges and franchises.”

On March 15, 1905, George E. Stillings issued a bulletin to agents, in which he said:

“We beg to advise you that by our consent and upon application of our counsel we had judgment entered against The Preferred Mercantile Company of Boston on the 13th inst., thereby surrendering our charter of that company. We then made application for a new charter to be granted us under the laws of Massachusetts in the name of ‘The Preferred Mercantile Company.’ We, however, will carry the case of the former company to the Supreme Court of the United States to test the constitutionality of the law under which that charter was forfeited.

In reference to the new ‘Preferred Mercantile Company’ will say that the contract that we will issue under it will eliminate entirely the objectionable feature as found by the Supreme Court of Massachusetts, of which we have heretofore given you full information and the contracts of the new company will be exchanged for the contracts of the old company on the same basis as was done heretofore. That is, each patron will be credited thereon with the same number of weekly payments paid on the old and will have the same number of weekly payments to make to complete the contract. The series and numbers of contracts to be exchanged will remain the same. You can continue accepting weekly installments from your patrons for the proposed new company, notifying them of the fact that a new company is necessary for the elimination of the objectionable feature,

which we have ascertained we can remedy without making any radical changes. The fact that we will re-incorporate under the laws of the State of Massachusetts is, of itself, conclusive proof of our sincerity, and shows clearly that we are acting in the interests of the contract-holders.

* * * We place our application for a new charter tomorrow and we do not anticipate much delay in obtaining it from the state, although it may necessitate us mandamus the commissioner of corporations to procure it, although this is only a surmise on our part. We have ascertained that it will not be necessary for us to operate under a foreign charter and we therefore prefer one in this state."

Thereafter, the Commonwealth of Massachusetts filed a bill, No. 9240 equity, asking the appointment of a receiver. The receiver was appointed and took possession of the company's office March 30, 1905.

Meanwhile between the judgment of ouster and the appointment of the receiver the business of The Preferred Mercantile Company of Boston, under the direction of the defendants, went on as usual. The following differences are the only ones of which there is any evidence:

(1) The bank account in the name of L. A. Dooley was closed and a new account was started in another bank, The New England Trust Company, in the name of Guy C. Stillings. Into this account, apparently his personal account, were put the receipts which came in daily by express from contract-holders of The Preferred Mercantile Company of Boston as payments of instal-

ments on their outstanding contracts. I find that the amount of such receipts from March 14 to March 30, 1905, was \$10,985.01.

(2) The books of The Preferred Mercantile Company of Boston were closed on March 14, 1904, and thereafter the accounts of the company were kept on loose sheets of paper.

(3) In some instances the agents stamped upon outstanding contracts of The Preferred Mercantile Company of Boston and upon the receipts of that company given for instalments paid upon such contracts, with a rubber stamp, the words "Incorporated and chartered under the laws of the United States in the District of Columbia, Washington, D. C. Home Office Boston, Mass. George E. Stillings, President."

In other respects the business went on as before, under the personal, attentive management of George E. Stillings. It even issued new contracts on the blanks of The Preferred Mercantile Company exactly similar to those contracts issued prior to March 14, 1905.

A new man came into the office force on March 13th, one Lucas H. Kendall, and took the place of Boston manager vacated by John F. Knisely. He continued in the employment of the corporation and collected several hundred dollars from the contract-holders as instalments on their outstanding contracts with The Preferred Mercantile Company of Boston. This amount was deposited under the instructions of George E. Stillings in the Washington Trust Company, being mingled with the private funds of Lucas H. Kendall in his own personal account.

On March 30, 1905, the receiver, after the defendants had knowledge of the decree, went to the office of The Preferred Mercantile Company of Boston and demanded of the defendants personally everything covered by the decree. The decree was as follows:

“INTERLOCUTORY ORDER.

“This cause came on to be heard upon motion of the plaintiff, and thereupon it is ordered that Burton P. Gray of Boston be and he is hereby appointed temporary receiver of all the property and effects of the defendant, including all moneys, books and papers, lists of contract holders of the defendant and copies of such lists and papers, and the defendant, its officers, servants and agents are hereby ordered to deliver to said receiver all such property, moneys, books, papers and lists and copies thereof, and all moneys that shall arrive for the defendant, its officers, servants or agents.

The said receiver is to give bond in the sum of \$5,000 within three days from this date, and is to hold the property as receiver until the further order of the court.

Leave is given to either party to apply for a modification or for further orders.”

I find that the defendants secreted from the receiver the pass book in the New England Trust Company containing the account of the receipts of the corporation between March 14 and March 30, carried in the name of Guy C. Stillings, and the check book showing the drafts upon that account.

I find that they concealed from the receiver the pass book of the Washington Trust Company showing de-

posits of assets of The Preferred Mercantile Company of Boston standing in the name of Lucas H. Kendall, and the check book showing his drafts upon the same. I find that they concealed from the receiver all the papers and memoranda showing the business of the corporation after March 14, 1905. I find that they delivered to him only books and papers of the corporation kept prior to and including March 14, 1905.

While the books as balanced showed that there was on hand \$104.39 belonging to the various redemption funds on March 14, 1905, they delivered to the receiver only \$14.06. At the date of the appointment of the receiver I find that the defendants had in their possession at least the following amounts which they secreted and withheld from the receiver:

The \$10,985.01 above mentioned which came in from contract-holders of The Preferred Mercantile Company as instalments on their outstanding contracts between March 14 and 30th, 1905.

The money collected by Lucas H. Kendall as above stated from contract-holders in The Preferred Mercantile Company as instalments on their outstanding contracts, amounting to several hundred dollars. The testimony was not precise upon the point of its amount.

The \$640 above mentioned which was taken from the redemption fund on March 10, 1905, and paid to George E. Stillings in redeeming for the second time contracts B 2452-2455, standing in the name of I. M. Walters.

The \$104.39 shown by the books to be on hand belonging to the redemption funds on March 14, 1905.

Money which had been paid into The Preferred Mer-

cantile Company by contract-holders prior to March 14, deposited in the American National Bank in the form of certificates of deposit in the name of George E. Stillings, one of \$2000 deposited January 31, 1905, the other of \$5000 deposited February 16, 1905.

Money which had been paid into The Preferred Mercantile Company by contract-holders prior to March 14, deposited in the First National Bank in the form of certificates of deposit in the name of George E. Stillings, one of \$2000, deposited October 19, 1904, the other of \$5000, deposited February 23, 1905.

There was also money which had been paid into The Preferred Tontine Mercantile Company by contract-holders thereof and removed to Boston by George E. Stillings and deposited in The New England Trust Company August 5, 1904, in the form of a certificate of deposit in the name of George E. Stillings for \$5000. Of this there remained in The New England Trust Company undrawn on March 14th \$3500. I find that this was an asset of The Preferred Tontine Mercantile Company which was turned over and became an asset of The Preferred Mercantile Company though held in the name of George E. Stillings. On or about May 11, 1905, during the pendency of this hearing, George E. Stillings cashed the certificate of deposit and spent the money.

None of this money was delivered to the receiver except the \$14.06 above mentioned.

During the pendency of the contempt proceedings the receiver learned of the two certificates of deposit in the American National Bank and the two certificates

of deposit in the First National Bank, aggregating \$15,000, above described. Also of a certificate of deposit in The American National Bank in the name of George E. Stillings, dated May 11, 1905, for \$642.62. These the receiver called to the attention of the Supreme Court on June 6th, and George E. Stillings was ordered to turn them over to the receiver forthwith, the receiver to keep the proceeds thereof in a separate fund pending a determination of the question to whom they belonged.

The day the receiver was appointed, March 30, 1905, Guy C. Stillings drew a check upon the account of The Preferred Mercantile Company in The New England Trust Company, standing in his name, payable to cash, for \$8000, and delivered it to George E. Stillings who cashed it. Guy C. Stillings did this because George E. Stillings told him to do it, and for no other reason.

After the appointment of the receiver the defendants went to their office in the afternoon and found the receiver in possession. The same afternoon, after George E. Stillings was acquainted with the decree, he said to the receiver, in substance, "Because the Supreme Court of Massachusetts has been persuaded to find that this company has been doing business in violation of law you must not think we are whipped. We have never been whipped, and this business is going to continue." Being asked where the money was which was daily coming in from contract-holders as instalments on their contracts with The Preferred Mercantile Company, George E. Stillings said that he was not fool enough to tell where the money was coming from or who had it.

Later that same afternoon a letter was sent to each

of the following express companies,—Adams Express Company, American Express Company, Wells, Fargo Express Company and National Express Company, in language as follows:

“This is to notify you to not deliver any packages whatsoever to Guy C. Stillings or our proposed new organization (unincorporated ‘The Preferred Mercantile Company’) but hold the same at your office and same will be called for.

This is to certify that no moneys or packages whatsoever of our knowledge are being sent to the Winthrop Building at Boston for The Preferred Mercantile Co. of Boston (unincorporated), nor have we any knowledge of any packages to come for said corporation; and this is to certify that all packages being sent to Guy C. Stillings or our proposed new organization are for the latter named parties.”

The four letters all of the above tenor, were dictated by George E. Stillings and signed by Guy C. Stillings. George E. Stillings told Guy C. Stillings that his reason for sending those letters was that he didn’t want the stuff coming in to fall into the receiver’s hands.

That same afternoon George E. Stallings told the clerks in the office of The Preferred Mercantile Company not to receive any more express there, but to take it and sign for it in another office.

The receiver obtained from these express companies during the next few days packages from various agencies of The Preferred Mercantile Company, containing moneys and drafts addressed to the corporation, to Guy C. Stillings and to George E. Stillings. After

a few days no more packages came. Numerous letters from the contract-holders to the receiver, which came to him during the pendency of these contempt proceedings and which were introduced in evidence by the defendants themselves, without objection from the Attorney-General, make it clear that during the pendency of these proceedings and even as late as the first week in June, many of the contract-holders of The Preferred Mercantile Company of Boston have been paying to the local agents the regular instalments on their contracts with that corporation.

In conclusion I find that the series of acts which I have enumerated were done with wilful, carefully devised intent to disobey the decrees of this court.

At the request of the defendants and with the consent of the Court, I report all the evidence.

JAMES D. COLT,
Special Master.

A true copy.

Attest:

Walter F. Frederick,
Assistant Clerk

COMMONWEALTH OF MASSACHUSETTS.

Suffolk, ss.

No. 9240 Eq.

Supreme Judicial Court in the matter of the information for contempt filed on March 31, 1905, by Frederick H. Nash, Assistant Attorney General, on behalf of the Commonwealth against George E. Stillings and Guy C. Stillings in Commonwealth of Massachusetts

v.

The Preferred Mercantile Company of Boston.

This matter came on to be heard before me at Boston on the eleventh day of July, 1905, the Attorney General and each of the respondents George E. Stillings and Guy C. Stillings being present in person and the respondent George E. Stillings being also represented by his counsel Charles W. Bartlett, Esq., and the respondent Guy C. Stillings by his counsel Robert W. Nason, Esq.

The report of James D. Colt, Esq., special master, filed June 29, 1905, was laid before me and the effect to be given thereto was argued by counsel, as was also the cause in general. Having considered the question of the effect to be given to the master's report I felt that it was the better course for me to take up the question whether upon the evidence reported by the master the respondents or either of them were guilty of contempt as alleged in the information, without reference to the specific findings of fact or the general finding contained in the master's report, and I have pursued that course without making any specific ruling as to the effect to be given to the conclusions and findings of a master under circumstances like those of the present instance, and I have considered the case of the several respondents only upon the pleadings, the evidence reported by the master and the exhibits accompanying the same and the arguments of the Attorney General and of the several counsel for the respective respondents and upon certain oral testimony of the respondent George E. Stillings produced in open court before me

and reported by a stenographer in a volume marked by me J. M. B. July 11, 1905.

I accordingly have read and considered all the evidence reported by the master in the two volumes containing 1195 typewritten pages accompanying the master's report, the volume marked J. M. B. July 11, 1905, and also all the exhibits specified by either the Attorney General or the several counsel of the respective respondents in argument and also all the exhibits specified in a memorandum handed to me by leave on July 14, 1905, by Messrs. Bartlett and Nason of counsel.

In reading and considering the evidence I was of opinion that no fact should be found to be established unless upon the evidence it was proved beyond a reasonable doubt and I have governed myself by that rule in making the following findings:

First I find that between the fourteenth day of March, 1905, and the thirtieth day of the same March the said George E. Stillings and Guy C. Stillings and each of them received at Boston large sums of money from agents of the said Preferred Mercantile Company of Boston, which money belonged to said Company, and that on said thirtieth day of March the said George E. Stillings and the said Guy C. Stillings had said money so received in their possession and control, and that on said thirtieth day of March said money was duly demanded by Burton P. Gray, Esq., Temporary Receiver of said Company by virtue of the order entered in this cause requiring the said Preferred Mercantile Company of Boston, its officers, servants and agents to deliver to the said receiver all the property of said Company, and

that on said thirtieth day of March the said George E. Stillings and the said Guy C. Stillings each having full knowledge of said order, and each knowingly and deliberately intending to disobey the said order, each refused to deliver to the said Gray as temporary receiver the said money of said Company so as aforesaid then in their possession and control, under the pretense that said money was received by them as agents of a new corporation other than the said Company, and so that the said George E. Stillings and the said Guy C. Stillings each were and are severally guilty of wilful and deliberate intentional disobedience of the said order of March 30, 1905, and each guilty therein and thereby of contempt of this court, within the allegations of said information of contempt.

And further upon considering the said report of the said special master I find that the statements of fact therein are duly established upon the evidence.

JAMES M. BARKER,

J. S. J. C.

A true copy.

Attest:

Walter F. Frederick,

Assistant Clerk.

COMMONWEALTH OF MASSACHUSETTS.

Suffolk, ss.

Supreme Judicial Court.

No. 9046 Eq.

In the matter of the information for contempt filed
on April 11, 1905,

Attorney General

v.

George E. Stillings and Guy C. Stillings.

This matter came on to be heard before me at Boston on the 11th day of July, 1905, the Attorney General, and each of the above named respondents being present in person, and the respondent George E. Stillings being also represented by his counsel Charles W. Bartlett, Esq., and the respondent Guy C. Stillings by his counsel Robert W. Nason, Esq.

The report of James D. Colt, Esq., Special Master, filed June 29, 1905, was laid before me, and the effect to be given thereto was argued by counsel, as was also the cause in general. Having considered the question of the effect to be given to the master's report, I felt that it was the better course for me to take up the question whether upon the evidence reported by the master, the respondents or either of them were guilty of contempt as alleged in the information without reference to the specific findings of fact or the general finding contained in the master's report and without giving any effect as proof to the findings of the master, and I have pursued that course without making any specific ruling as to the effect to be given to the conclusions and findings of a master under circumstances like those of the present case, but not considering or giving any weight to the findings and conclusions of the master in the present instance, and considering the case of the several respondents only upon the pleadings, the evidence reported by the master and the exhibits accompanying

the same and the arguments of the Attorney General and of the several counsel for the respective respondents, and upon certain oral testimony of the respondent George E. Stillings produced in open court before me and reported by a stenographer in a volume marked by me, J. M. B. July 11, 1905.

I accordingly have read and considered all the evidence reported by the master in the two volumes containing 1195 type written pages accompanying the master's report, the volume marked J. M. B. July 11, 1905, and also all the exhibits specified by either the Attorney General or the several counsel for the respective respondents in argument and also all the exhibits specified in a memorandum handed to me by leave on July 14, 1905, by Messrs. Bartlett and Nason.

In reading and considering the evidence I was of opinion that no fact should be found to be established unless upon the evidence it was proved beyond a reasonable doubt and I have governed myself by that rule in making the following findings:

I find that by the preliminary injunction issued by this court in the cause on November 26, 1904, and referred to in this information for contempt, the said George E. Stillings and the said Guy C. Stillings were duly enjoined from in any way disposing of the money of the said Preferred Mercantile Company of Boston, then already received or which might thereafter be received in the course of its business otherwise than by disposing of such money in the ordinary course of the business of said Company and that on said November 26, 1904, and at all times thereafter the said George E.

Stillings and the said Guy C. Stillings each had full notice and knowledge of said order and of said injunction therein contained.

That wilfully and knowingly intending to disobey said injunction, for the purpose of so disposing of the money of said Company that in case its charter should be decreed and adjudged by this court to be forfeited and avoided they the said George E. Stillings and Guy C. Stillings might nevertheless and in defiance of any order which might be made by this court for the disposition of said money use and control said money in carrying on the business then being done and solicited by said Company, for their own benefit and advantage, after the entry of such order by this court, the said George E. Stillings and the said Guy C. Stillings did each at different times after the said November 26, 1904, and before April 10, 1905, dispose otherwise than in the ordinary course of the business of said Company and belonging to said Company, namely

From said November 26, 1904, to April 14, 1905, the said George E. Stillings and the said Guy C. Stillings caused the current funds of said Company to be deposited in bank not in the name of the said Company but in the name of one L. A. Dooley.

After November 26, 1904, and before April 10, 1905, the said George E. Stillings and the said Guy C. Stillings caused large sums of money of said company to be expended and disposed of in the purchase by the corporation contracts which the ordinary course of its business was to redeem in due order and not otherwise to expend its money for or on account of.

After November 26, 1904, and before April 10, 1905, the said George E. Stillings and the said Guy C. Stillings caused large sums of the money of said Company to be expended and disposed of in the redemption of contracts out of their due and regular order of redemption.

After November 26, 1904, and before April 10, 1905, the said George E. Stillings and the said Guy C. Stillings caused large sums of the money of the said Company to be expended and disposed of in the making of preparations intended and designed by them solely for the purpose of enabling them to continue to carry on the business of the corporation which should be outstanding and not closed at the time of the decision of this court as to the forfeiture of the charter of the Company, in disregard of such decision if the same should be in favor of the Commonwealth and adverse to the Company.

And so I find and determine that the said George E. Stillings and the said Guy C. Stillings each were and are severally guilty of wilful and intentional and deliberate disobedience of said order and injunction of this court made and entered on November 26, 1904, and that each of them was and is guilty therein and thereby of contempt of this court, within the allegations of said information of contempt.

And further upon considering the said report of the said special master I find that the statements of fact therein are duly established upon the evidence.

JAMES M. BARKER,

J. S. J. C.

A true copy.

Attest:

Walter F. Frederick,

Assistant Clerk.

COMMONWEALTH OF MASSACHUSETTS.

Suffolk, ss.

Supreme Judicial Court.

No. 9240 Equity

Commonwealth of Massachusetts

vs.

The Preferred Mercantile Company of Boston.

And now it appearing to the Court that George E. Stillings and Guy C. Stillings each have heretofore been arrested and brought before this court by virtue of a *capias* issued in the above entitled cause for a contempt of this court, in that they have each failed and neglected to obey the decree of this court entered in the above entitled cause, dated March 30, A. D. 1905, wherein it was ordered that the respondent corporation, its officers, servants and agents, deliver to Burton Payne Gray, Esquire, the temporary receiver therein named, all property, moneys, books, papers and lists of contract-holders and copies thereof, and all moneys that should thereafter arrive for the respondent corporation, its officers, servants and agents, and that each was thereafter admitted to bail to abide the final order of the court thereon, and they the said George E. Stillings and Guy C. Stillings each having appeared and now being in person before said court, on this eleventh day of August, A. D. 1905, and having heretofore been examined under the direction of the court touching the matters and things alleged against them as aforesaid, and each having been fully heard thereon; and it appearing to the court on such examination and hearing that the said George E.

Stillings and Guy C. Stillings are each guilty of the contempt of court alleged against them, in that they have failed and neglected to obey the terms of the said decree and each have wilfully failed and refused and still wilfully fails and refuses to obey the said decree and order of this court:

It is Ordered, Adjudged and Decreed, that the said George E. Stillings and Guy C. Stillings are each guilty of contempt of this court as aforesaid and that the said George E. Stillings be and he hereby is sentenced to suffer imprisonment in our common jail in our County of Suffolk for the period of

One year from this date,

unless he be sooner discharged by the further order of our said court, or some justice thereof; and that the said Guy C. Stillings be and he hereby is sentenced to suffer imprisonment in our common jail in the County of Suffolk, for the period of

One year from this date,

unless he be sooner discharged by the further order of the court or some justice thereof.

And on motion of Herbert Parker, Esquire, Attorney General of the Commonwealth, it is ordered that the said George E. Stillings and Guy C. Stillings, for their misconduct and contempt of court as aforesaid, be committed to our common jail of the County of Suffolk, for the respective periods as above set forth, unless they be sooner discharged by the further order of this court, or by due process of law.

By the Court,

WALTER F. FREDERICK,

Assistant Clerk.

August 11, 1905.

A true copy.

Attest:

Walter F. Frederick,
Assistant Clerk.

EXHIBIT "E."

A. D. Baker & Co.,
723 Chamber of Commerce,
Portland, Oregon.

Gentlemen:

My attention has been called to the fact, that you are representing the National Mercantile Company, limited, of Vancouver, B. C., and that through you, at its representative, this company is transacting and has transacted a considerable business in this State. I call your attention to the fact, that such operation is in violation of the law, and I enclose you forms for the entrance of your Company in this State, suggesting that you at once comply with the statutes.

Trusting to hear from you at the earliest moment possible, I am

Very sincerely,

H

EXHIBIT "F."

**THE NATIONAL MERCANTILE COMPANY,
LIMITED.**

Home Office

Winch Building, Vancouver, B. C.

August 21st, 1913.

R. A. Watson, Esq.,
Corporation Commissioner,
State of Oregon.

Sir,

I am in receipt of a communication to Messrs. A. D. Baker & Co. of 723 Chamber of Commerce, Portland, Oregon, under date of August 18th, 1913. In reference thereto allow me to inform you that A. D. Baker & Co. are in no way shape or manner the Agents or Representatives of The National Mercantile Co. Ltd. of Vancouver, British Columbia.

Further that this Company does not maintain any office nor any Agent in the State of Oregon, but that we transact all of our business therein through the mails and under the protection of the Inter-State Commerce Act of the United States.

The connection that Messrs. A. D. Baker & Co. maintain with this Company is that of Purchasers of our Contracts; these contracts are secured by mail upon application and are sold direct to Messrs. A. D. Baker & Co. The transaction as such is legal in any Court and we can and will maintain it such.

I note your suggestion to A. D. Baker & Co. that

this Company become licensed under the Oregon "Blue Sky" Law.

In reference thereto I am taking such subject up under a separate communication of even date herewith and will await your further pleasure in the matter.

However, I wish to advise you that until our Company becomes licensed as per your suggestion that we will continue to prosecute the mail order business of this Company in the State of Oregon, which is the same plan of business that we transact in Washington, California, Missouri. Our Company operating by license in the States of Colorado, Nebraska, Massachusetts, and in British Columbia and New Brunswick, Canada.

I beg also to advise you that heretofore we have made effort to license in the State of Oregon under the Foreign Corporations Act, but were refused on the ground that we were a Building and Loan Association, which is not true for many reasons, and for the very simple reason that our Contract guarantees a definite profit at a definite time and our Contract Holders are not required to assume a partnership liability.

Awaiting your further advices,

I beg to remain,

Yours truly,

(Signed) G. E. STILLINGS,

President.

EXHIBIT "G."

**THE NATIONAL MERCANTILE COMPANY,
LIMITED.**

Home Office

Winch Building, Vancouver, B. C.

August 21st, 1913.

R. A. Watson, Esq.,
Corporation Commissioner,
Corporation Dept. Salem,
Oregon.
Sir,

Acting upon your suggestion received through Messrs. A. D. Baker & Co. of Portland Oregon, I am herewith enclosing you a copy of Contract as issued by this Company, which in itself shows in full detail the plan upon which we propose to transact business and it is the only contract or plan that we make with the public.

The name and location of the Company is shown upon our literature.

In reference to a financial statement, will say that after you have gone into the matter of our right to transact business in Oregon under, and according to, our Contract and printed matter and, if your decision is in our favour, we will be glad to make the financial statement and comply with all other requirements including the payment of the fee of \$100 and the Filing Fee of \$50.

Awaiting your further pleasure,

I beg to remain,

Yours truly,

(Signed) G. E. STILLINGS,

President.

K/GES

EXHIBIT "H."

Aug. 25, 1913.

The National Mercantile Co., Ltd.,

Winch Building,

Vancouver, B. C.

Attention

Geo. E. Stillings

Gentlemen:

I am in receipt of your letters of August 21st, in reference to my communication to Messrs. A. D. Baker & Co. of Portland, listed in your literature as agents of your company.

I note your explanation of the procedure under which you transact business in this State. This, in my opinion, is a patent evasion of the laws of this State. It matters not whether you come under the building and loan statute. If you come under this statute, you should enter the state as a building and loan association, and comply with the laws in reference thereto; if not, you should enter as a foreign corporation and comply with the general laws, regulating the entrance and transaction of business in this State by foreign corporations.

This is to notify you, that the sale of your contracts in this State will be considered a violation of the law, until such time as you have complied with the statutes. I am notifying A. D. Baker and Mr. Faulkender to this effect.

I am forwarding you under separate cover blanks necessary for the entrance of your company into the State, together with copy of the general Corporation Laws, and a copy of Chapter 341, G. L. 1913.

Trusting that you will give the matter your immediate attention, I am,

Very truly yours,

H

Filed April 28, 1914. A. M. Cannon, Clerk.

And afterwards, to wit, on the 15th day of June, 1914, there was duly filed in said Court, and cause an ANSWER OF DEFENDANTS A. M. CRAWFORD, ET AL., in words and figures as follows, to wit:

ANSWER OF A. M. CRAWFORD, ET AL.

Come now the defendants, A. M. Crawford, Walter H. Evans, John Irwin, E. E. Kelly, George M. Brown, Joseph M. Devers, Arthur Clarke, Lawrence A. Liljequist, Gale S. Hill, Ernest R. Ringo, Gilbert L. Hedges, D. H. Upjohn, E. B. Tongue, C. W. Mullens, W. B. Dillard, W. A. Bell, Frederick H. Steiwer, and C. T. Godwin, and as a plea and abatement to the bill herein allege the following facts, to wit:

I

That the plaintiff has never been and is not now a corporation organized or existing under the laws of the State of Oregon; that since October, 1912, it has been engaged and is now engaged in business in making loans and taking mortgages within the State of Oregon, all as alleged and described in the Bill of Complaint, but that it has not at any time prior to or since the commencement of this suit complied with the laws of the State of Oregon, and particularly Section 6707 Lord's

Oregon Laws, Volume III, page 2407, in this: That it has not at any time furnished or offered to the Secretary of State, upon blanks to be supplied by the said Secretary, or otherwise, a correct or any statement, sworn to by one of the officers of plaintiff, or the managing agent, or authorized attorney in fact, or otherwise, before an officer duly authorized to administer oaths, or otherwise, or setting forth the name of the plaintiff, or the location of its principal office, or the names of its president, or secretary or treasurer, or with the post office address of each or either, or the date of the annual election of directors or officers of such corporation, or the amount of the authorized capital stock, or the number of shares or par value of each share, or the amount of capital stock subscribed, or the amount of capital stock issued, or the amount of capital stock paid up, or any statement giving the name or post office addresses of its managing agents, or attorneys in fact in the State of Oregon; and it has not complied with the other provisions of the said section in any respect, but which provisions are not herein specifically referred to for the reason that the other provisions of the section have been declared to be unconstitutional by the Supreme Court of the State of Oregon in the case of **HIRSCHFELD v. McCULLOUGH**, 130 Pac. 1131.

The plaintiff has not complied with the laws of the State of Oregon, and particularly Section 6726, Lord's Oregon Laws, Vol. III, page 2413, in this: That the plaintiff has not duly or otherwise executed or acknowledged a power of attorney, or caused any power of attorney to be recorded in the office of the Secretary of

State, appointing a person, a citizen of the United States, or a citizen or resident of this state, or otherwise, as attorney in fact for the plaintiff, and has not, at any time, appointed or maintained any person, qualified or otherwise, as its attorney in fact.

And the plaintiff has not complied with Section 6727 of Lord's Oregon Laws, Vol. III, page 2414, in this: That it has not filed with the Secretary of State or the Corporation Commissioner, a written or other declaration of its desire or purpose to engage in business within this State, or setting forth any name under which it proposes to transact business, or the name of the State or country under whose laws it was organized, or the location of its home office, or the date of its formation or incorporation, or the amount of its capital stock, or the nature of the pursuit, business or occupation in which it is authorized to engage, or the location of its principal office within this State, or the name of any attorney in fact, or the names or addresses of its principal officer, or of its directors or trustees, or the name or residence of its general agent within the state of Oregon, or any accompanying certified or other copy of its charter or articles of incorporation, either certified by the legal keeper of the original, or otherwise, or by the United States Ambassador, Minister, Consul-General, Vice-Consul or Charge D'Affaires of the foreign country under whose jurisdiction the plaintiff was or claims to have been formed, or any certificate of such officer that he has the requisite official knowledge as to whether such charter or articles of incorporation are of a genuine, valid or subsisting character, or that such copy was

duly certified by the officer having the legal custody of the original. And this plaintiff has not complied with said last named Section, in this: That it has not, at any time, offered or paid to the Secretary of State, or to the Corporation Commissioner, the sum of \$50.00, or any part thereof, required by the said Section, for filing and recording the said papers. And the plaintiff has not complied with the act of the Legislature of 1913, General Laws of Oregon, 1913, page 772, in that it has not paid or offered the annual license fee of \$100.00 therein provided to be paid. By reason of the premises the plaintiff has not been authorized to transact any of the business which it has transacted, and it is not authorized to transact any further business in the State of Oregon, and is not authorized to maintain this suit, for that Section 6708, Lord's Oregon Laws, Vol. III, page 2408, provides in effect that a failure of a foreign corporation to pay any fee which shall have become due and payable against it as provided in the said act, or any law of this State, prohibits it from maintaining any suit, action or proceeding in any court of justice within the State while such delinquency should continue; and for that the said Section 6726 provides in effect that a failure to appoint an attorney in fact as provided in said section, as aforesaid, prohibits the plaintiff from transacting any business within this State, or maintaining any action, suit or proceeding in its courts. And the defendants further allege that neither the Secretary of State nor the Corporation Commissioner has issued to the plaintiff any certificates to the effect that the plaintiff has filed a declaration required by the said Sections, as aforesaid.

And further answering the bill in this case, upon the merits,

II

These defendants say that defendants have no information sufficient to form a belief as to whether the plaintiff is a corporation organized or existing under the laws of the Province of British Columbia, Dominion of Canada, or has its general offices or principal place of business in the City of Vancouver, Province of British Columbia, Dominion of Canada, and leave the said allegation to be proved.

III

These defendants deny that this is a suit between citizens of different states.

IV

These defendants admit that the plaintiff is engaged in the business of loaning money upon mortgage security upon real property, and that the contracts it makes are in form as marked "Exhibit 1" of the bill of complaint; and that the application therefor is as "Exhibit 2" of the bill of complaint, and the application from A. D. Baker to the complainant is as "Exhibit 3" of the bill of complaint; and that the plaintiff issues such contracts to prospective borrowers, and that the borrowers are placed in groups of one hundred in the consecutive order of the signing of the contracts, and upon the accumulation of sufficient funds in the loan fund of the plaintiff, the borrowers become entitled under such proposed contract to loans in their consecutive order.

These defendants admit that the plaintiff maintains offices in many cities of the different states of the United States of Amercia, and also in many cities of the various provinces of the Dominion of Canada, and appoints agents who have charge of certain allotted amounts of territory.

These defendants admit that the borrower is required to sign an application as stated in the bill, a copy of which is "Exhibit 2," which is presented to the plaintiff's representative, and at the same time the said representative places an application with the plaintiff for the loan.

These defendants admit that the general agent of the plaintiff in Oregon is A. D. Baker, and that his office address is room 723 Chamber of Commerce Building, Portland, Oregon, in which city and state he regularly resides. They admit that when the application is approved by the plaintiff, plaintiff issues to the said A. D. Baker an undertaking, under seal, whereby the plaintiff, in consideration of the payment of 1/100 of the amount of the desired loan each month, undertakes and agrees to pay to the said A. D. Baker the amount of the loan desired as soon as the loan fund of the plaintiff contains a sufficient amount of money to make up the said loan; that the said undertaking, by express terms, is assignable, and the said A. D. Baker, upon the receipt of the said undertaking, at once assigns the same over in writing to the prospective borrower, who thereupon makes his payments to the said A. D. Baker, or to the plaintiff at the option of the borrower. But in this connection these defendants allege that the last named provisions of the said contract and of the said

plan of plaintiff constitute a device by which it is sought to make it appear that the loans are made by the Company in its home office with A. D. Baker, in Oregon, so as to claim that it is not doing the said business within the State of Oregon; but that in truth and in fact the said A. D. Baker is the agent of the plaintiff residing and doing business within the State of Oregon, as alleged in the complaint, and as admitted in this answer.

These defendants admit that the loan fund of the plaintiff is composed of the monthly installments, together with repayments of various loans made by it, and that the loans made by the plaintiff to its various borrowers are secured by mortgages upon real property in Oregon, or wherever it borrowers live, and that they draw three per cent annual interest. These defendants admit that the said loans are repaid to the plaintiff by the borrowers in monthly installments of seventy cents per month of each one hundred dollars borrowed, with interest at three per cent; that the plaintiff likewise sells the people in Oregon, and elsewhere, matured contracts, ready for loans, which loans when made pay the plaintiff five per cent annual interest; and that the application for loans, as soon as received by plaintiff, are at once given a consecutive number in the order of their receipt, and are placed in classes of one hundred. But whether the payments made upon the groups of contracts of one hundred are kept in individual funds, or whether the contract holder in each group of one hundred having the oldest date is the first to secure a loan, or whether thereafter the loans are made in the chronological order of the issue of the contracts, these defend-

ants have no knowledge or information sufficient to form a belief and leave the said allegations to be proved to the satisfaction of the Court.

V

These defendants admit that the home office is, and some of the business affairs of the plaintiff are conducted in the City of Vancouver, Province of British Columbia, Dominion on Canada; but deny that the said affairs are administered in accordance with the laws or regulations of the said alleged sovereignty, or that they are all or any of them conducted in lawful, honest or meritorious manner.

VI

These defendants admit that the plaintiff, by its agents and representatives, is offering in the State of Oregon to take applications for loans and to enter into contracts with borrowers for loans; and that plaintiff by advertisement and otherwise professes the business for taking applications for loans and making such loans, and entering into contracts for such loans, and that it is engaged in such business in the State of Oregon, as alleged in Paragraph VI of the bill of complaint. That the taking of such applications and the making of such contracts are in the course of continuous and successive transactions of a similar nature, and that the plaintiff is not, in taking applications and making such loans, acting in a trust capacity created by law.

VII

These defendants admit that the plaintiff has been engaged in the said loan business since the month of

October, 1912, and since that time it has vigorously conducted its said business. These defendants deny that plaintiff has invested large or any sums of money in said business, but allege that the money that it has consists solely of the payments of the monthly installments of the borrowers, as provided in the said contract "Exhibit 1" of the bill of the plaintiff.

As to whether the plaintiff has acquired mortgages or other securities of great value, or has outstanding a large or any number of contracts of great or any value, of the kind described in the preceding paragraphs, the defendants have no knowledge or information sufficient to form a belief and leave the said allegations to be proved to the satisfaction of the court.

These defendants admit that the plaintiff has contracted from time to time to make such loans of the kind described in "exhibit one."

VIII

These defendants have no knowledge or information sufficient to form a belief as to whether the plaintiff has expended or invested large or any sums of money in advertising, or in the establishment of its said business, or has acquired in the course of such business, a valuable good-will or an extensive clientele, or has acquired valuable information as to the conduct of its business, or information as to the names and addresses of the persons, firms and corporations who desire loans of the character described in the bill, or whether it has acquired such valuable good-will, information or other property, as above described, in the State of Oregon, and

therefore submit the said allegations to be proved to the satisfaction of the Court.

These defendants admit that the plaintiff sends into the State of Oregon its agents and employees, to there solicit applications for loans, and transmit the said applications to the plaintiff in Vancouver, British Columbia, and make the said loans in the State of Oregon; and admit that the said applications are accepted by plaintiff in Vancouver, British Columbia, and that said contracts are then forwarded to the contract holders in Oregon, but whether from the offices of the plaintiff in Vancouver, British Columbia, the defendants have no knowledge or information sufficient to form a belief and leave the said allegation to be proved.

IX

These defendants deny that the representations made by the plaintiff, or by its agents or representatives, as to the contracts and applications therefor, and loans, are true representations.

X

These defendants say they have no information sufficient to form a belief as to whether or not the plaintiff has been, or now is, solicited by various persons, firms or corporations, to secure applications for loans, and loans, as described in the bill, or that it has contracted to make such loans, or that the owners of such contracts therefor have undertaken or agreed to pay the plaintiff a compensation for such loans, and therefore leave the said allegations to be proved to the Satisfaction of the Court.

XI

These defendants admit that the plaintiff and those with whom it has agreements have been informed that the said loans described in the bill cannot be made in Oregon, unless full compliance is made by the plaintiff with Chapter 341, General Laws of Oregon for 1913, which became effectual on the 3rd day of June, 1913.

XII

These defendants admit the allegations of the provisions of the act of the Legislature of 1913, as set forth in the bill of complaint entitled "An Act to protect purchasers of stocks and bonds and prevent fraud in the sale thereof; to create a corporation department, to administer this and other laws relative to the regulation and supervision of corporations, and providing penalty for the violation hereof," and that "Exhibit A" attached to the bill is a correct copy of the said law.

XIII

These defendants admit that defendant, R. A. Watson, Corporation Commissioner, has declared publicly his intention to enforce the provisions of said act, and his intention to prevent any sale or offer for sale in Oregon of securities covered and regulated by said act, and as to which the issuer thereof or the seller thereof has not in all respects complied with said act, and has declared his intention to enforce the penalties in said act set forth for any violation thereof; and admits that he caused the arrest upon warrant for the arrest of the said A. D. Baker, General Representative, and the said George E. Stilling, President of the plaintiff, and of

C. H. Hune and O. Sundberg, Local Representative of the plaintiff in Lane County, Oregon, and that the said arrests were made upon the complaint of the said Corporation Commissioner, and prosecuted by the District Attorneys in the respective counties in which the arrests were made, and that all said arrests were made for soliciting applications for loans from the plaintiff in the manner set forth in said bill, and for the violation of the terms of the said act.

XIV

These defendants admit that the defendant, R. A. Watson, issued the bulletin which is "Exhibit B" of the bill, and has prepared for use a preliminary report, Sheet 1, and a preliminary report, Sheet 2, which are "Exhibits C and D" of the bill, and the blanks, all as alleged in the bill of complaint, and has prepared for use application blanks and report blanks, which are "Exhibits E and F" of the bill; and admit that the said preliminary reports, "Exhibits C and D," require the information set forth in Paragraph XXXVI of the bill, and the subdivisions thereof; but deny that any right or property right of the plaintiff is invaded or destroyed, or its freedom to contract curtailed, impaired or destroyed, or that it is otherwise damaged in its business or property by reason of the said act of the Legislature, or the said act of the defendants.

XV

These defendants admit that the defendant, R. A. Watson, has issued the "Application of Stock Broker," a copy of which is "Exhibit E" of the bill.

XVI

In respect of the allegation of the bill that the said act of the Legislature is unconstitutional and void, the defendants deny the conclusions stated in the said allegations, but are advised that, being allegations concerning questions of law only and not of fact, they are not required to answer specifically each of the said contentions; but allege on the contrary that the said act is in none of its provisions contrary to the Constitution of the United States, or of the State of Oregon.

XVII

These defendants deny that any immediate or irreparable or other injury will be caused to the plaintiff by reason of the enforcement of said act.

XVIII

And further answering the said bill, these defendants allege that George E. Stillings is the president of the plaintiff and the principal owner and controller of its business; that it was organized by him, and that the plaintiff is the instrument of the said George E. Stillings through and by which to operate his plan and scheme. That the plan and scheme set forth in the bill is not an honest plan or scheme, but is devised and operated for the purpose of defrauding the general public of the State of Oregon. That the said plaintiff, operated and controlled by the said George E. Stillings as aforesaid, intends, in its operation, to defraud its customers, and that the plan and scheme as actually operated in the State of Oregon is fraudulent in purpose and fact. That the purpose and intent of the plaintiff as

aforesaid is to collect large sums of money from its customers, and to pretend to charge large sums for operating expenses and for the salaries of the said George E. Stillings and his confederates, so that the said customers will not be entitled to have or receive the money that they pay on their pretended contracts.

And in support of this allegation, and based upon the information hereinafter referred to, these defendants allege that the said George E. Stillings, in 1903, organized, in the State of Missouri, a corporation called the Preferred Tontine Mercantile Company, and purported to do a business upon contracts similar in form to those set out in the bill of complaint, and containing therein the same or similar provisions concerning the incurring of expenses, and that the attorney general of Missouri brought an action against the said Preferred Tontine Mercantile Company to restrain the Company from doing business in that State, and that the Supreme Court of the State of Missouri, on July 1, 1904, in the decision reported in 82 Southwestern Reporter, page 1075, held that the business of the said Company was in violation of the laws of Missouri, and ordered the appointment of a Receiver.

That thereafter, the said George E. Stillings and his brother organized a corporation in Massachusetts, called the Preferred Mercantile Company of Boston, and that the Attorney General of the State of Massachusetts brought a suit against the said company in the nature of quo warranto, and alleging that the said Company was engaged in an unlawful business, and that the said cause resulted in a decision of the Supreme Judicial

Court, reported in 187 Massachusetts, page 516, declaring that the business carried on by the Company was illegal, and, on March 14, 1905, an order was duly entered forfeiting the Company's charter. That the Special Master trying the said cause found that the said George E. Stillings was guilty of falsifying the books of the company and of converting the funds thereof, and upon the said report the company was ousted from its franchise. The said defendant was also imprisoned for contempt of the said court in disobeying its orders. That the United States postal authorities in 1904, prohibited by the use of the mails to the Preferred Mercantile Company, and these defendants are informed and believe that said George E. Stillings was indicted and convicted for using the United States mail to defraud, under a contract and proceeding similar in plan and conduct to the contract and plan involved in this suit.

And based upon the foregoing facts, and many others connected with the history of the said George E. Stillings and his companies, as aforesaid, these defendants charge and aver that the business of the plaintiff which it seeks to continue under the protection of this court, is not an honest business, but a fraudulent one, and that it is not entitled to the protection of this Court in the prosecution of its said business.

WHEREFORE, the defendants pray that the bill of complaint be dismissed as against these defendants, and that they have judgment against the complainant for their costs and disbursements.

A. M. CRAWFORD,

Attorney General.

WALTER H. EVANS.

District Attorney for Multnomah County, Oregon.

ARTHUR A. MURPHY,

Deputy District Attorney for Multnomah County,
County, Oregon.

Attorneys for said Defendants.

STATE OF OREGON,)
)
) ss.

County of Multnomah.)

I, A. M. Crawford, being first duly sworn, depose and say: That I am one of the defendants in the above entitled suit, and that the foregoing Answer is true as I verily believe.

A. M. CRAWFORD.

Subscribed and sworn to before me this 15th day
of June, A. D. 1914.

(Seal)

ARTHUR A. MURPHY.

Notary Public for the State of Oregon.

STATE OF OREGON,)
County of Multnomah.) ss.

Due and legal service of the within Answer is hereby accepted in Multnomah County, Oregon, this 15th day of June, 1914, by receiving a copy thereof, duly certified to as such by Arthur A. Murphy, one of Attorneys for defendants named herein.

GEORGE ROSSMAN.

Of Attorney for Complainant.

Filed June 15, 1914. A. M. Cannon, Clerk.

And afterwards, to wit, on the 19th day of June, 1914, there was duly filed in said Court, and cause a **SUPPLEMENTAL BILL OF COMPLAINT**, in words and figures as follows, to wit:

SUPPLEMENTAL BILL.

No.....

Now comes the plaintiff, and by way of Supplemental Complaint herein alleges:

I.

That since the above entitled suit was commenced the plaintiff duly prepared, upon blanks furnished by the defendant R. A. Watson, the Corporation Commissioner of the State of Oregon, a written declaration of its desire and purpose to engage in business in the State of Oregon, setting forth the name under which it proposes to transact business, and all other information required by the laws of the State of Oregon, and duly executed and acknowledged a power of attorney, as required by the laws of the State of Oregon, and tendered the same to said Corporation Commissioner, together with a certified copy of its Articles of Incorporation or Association, duly certified to by H. G. Garrett, Registrar of Joint Stock Companies in and for the Province of British Columbia, Canada, the legal keeper of the original thereof, and containing a certificate of R. E. Mansfield, the Consul General of the United States of America, stationed at Vancouver, B. C., Canada, as required by the laws of the State of Oregon,

together with the sum of Fifty-nine Dollars, a sum sufficient to more than cover the fees required by law to be paid for filing said papers, and requested the defendant R. A. Watson, as such corporation commissioner to file said papers and issue to plaintiff a license as required by the laws of the State of Oregon; but that said defendant R. A. Watson, acting as such corporation commissioner, refused to file same, and stated to plaintiff's solicitors that he would not file said papers or allow said plaintiff to comply with the laws of the State of Oregon regulating the carrying on of business in this State by foreign corporations, and further informing the plaintiff's solicitors that before the plaintiff would be allowed to carry on business in this State it would have to comply with the Building and Loan Act of the State of Oregon. That copies of said papers so tendered for filing, as aforesaid, are hereto attached, marked Exhibits "A," "B" and "C."

WHEREFORE plaintiff prays for relief as prayed for in in its original bill on file herein.

WILSON, NEAL & ROSSMAN,
Solicitors for Plaintiff.

"EXHIBIT A."

**DECLARATION OF PURPOSE TO ENGAGE
IN BUSINESS IN OREGON.**

KNOW ALL MEN BY THESE PRESENTS:

That the NATIONAL MERCANTILE COMPANY, Limited, a corporation organized and existing

under and pursuant to the laws of the Province of British Columbia, Dominion of Canada, having its principal office in the Winch Building in the Vancouver, Province of British Columbia, Dominion of Canada, hereby makes the following declaration of its desire and purpose to engage in business within the State of Oregon, which declaration is accompanied by a duly authenticated copy of its Articles of Association or incorporation in compliance with the provisions of "An Act to provide for the licensing of Domestic Corporations and Foreign Corporations, Joint Stock Companies and Associations, etc.," approved February 16, 1903:

The full name under which it proposes to transact business is The National Mercantile Company, Limited.

The name of the State or County under whose laws it was organized is Province of British Columbia, Dominion of Canada.

The location of its home office is at Number Winch Building, Vancouver, Province of British Columbia, Dominion of Canada.

The date of its formation or incorporation was the 10th day of August, 1911. The amount of its capital stock is Ten thousand (\$10,000.00) (\$.....) Dollars.

The nature of the pursuit, business, or occupation in which it is authorized to engage

(a) To carry on the business of a storekeeper in all its branches, and in particular to buy, sell, manufacture and deal in goods, stores, consumable articles, chattels and effects of all kinds, both wholesale and retail, and to transact every kind of agency business

and generally to engage in any business to transaction which may seem to the Company directly or indirectly, conducive to the interest or convenience of the Company's members or ticket holders or their friends or any section thereof.

(b) To make arrangements with persons engaged in any trade, business or profession for the concession to the Company's members, ticket-holders, and their friends of any special rights, privileges and advantages and in particular in regard to the supply of goods.

(c) To buy, sell, manufacture, repair, alter and exchange, let or hire, export and deal in all kinds of articles and things, which may be required for the purposes of any of the said businesses or commonly supplies or dealt in by persons engaged in any of the said businesses or which may seem capable of being profitably dealt with in connection with any of the said businesses.

(d) To carry on the business of a co-operative store and general supply society in all its branches and to transact all kinds of agency businesses.

(e) To acquire and undertake the whole or any part of the business, property and liabilities of any persons or company carrying on any business which the Company is authorized to carry on.

(f) To enter into any arrangement for sharing profits, union of interest, co-operation, joint adventure, reciprocal concession or otherwise, with any person or company carrying on or engaged in or about to carry on or engage in any business or transaction which this Company is authorized to carry on or engage in, or

any business or transaction capable of being conducted so as directly or indirectly to benefit the Company; and to lend money, guarantee the contracts of or otherwise assist any such person or company and to take or otherwise acquire shares and securities of any such Company and to sell, hold, re-issue, with or without guarantee or otherwise deal with the same.

(g) To take or otherwise acquire and hold shares in any other company having objects altogether or in part similar to those of this Company or carrying on any business capable of being conducted so as, directly or indirectly to benefit this Company.

(h) To promote any Company or companies for the purpose of acquiring all or any of the property and liabilities of this Company or for any other purpose which may seem, directly or indirectly, calculated to benefit this Company.

(i) Generally to purchase, take on lease or in exchange, hire or otherwise acquire any real and personal property and any rights or privileges which the Company may think necessary or convenient for the purposes of its business.

(j) To construct, maintain, and alter any buildings or works necessary or convenient for the purposes of the company.

(k) To instruct and deal with the moneys of the company not immediately required in such manner as may from time to time be determined.

(l) To borrow, raise or secure the payment of money in such manner as the Company shall think fit

and in particular by the issue of debentures or debenture stock charged upon all or any of the Company's property, including its uncalled capital and to purchase, redeem and pay off any such securities.

(m) To remunerate any person or Company for services rendered or to be rendered in placing or assisting to place or guaranteeing the placing of any of the shares of the Company's capital or any debentures or other securities of the Company or in or about the formation or promotion of the Company or the conduct of its business.

(n) To draw, make, accept, endorse, discount, execute, and issue promissory notes, bills of exchange, bills of lading, warrants, debentures, and other negotiable or transferable instruments.

(o) To sell or dispose of the undertaking of the Company or any part thereof for such consideration as the Company may think fit and in particular for shares, debentures or securities of any other company having objects altogether or in part similar to those of this Company.

(p) To adopt such means of making known the products or purpose of the Company as may seem expedient and in particular by advertising in the press, by circulars, by purchase and exhibition of works of art or interest by publication of books and periodicals and by granting prizes and donations.

(q) To sell, improve, manage, develop, exchange, lease, mortgage, dispose of, turn to account, or other-

wise deal with all or any part of the property and rights of the Company.

(r) To do all or any of the above things as principals, agents, contractors, trustees or otherwise and by or through trustees, agents, or otherwise and either alone or in compliance with the others.

(s) To do all such other things as are incidental or conducive to the attainment of the above objects or any one of them.

(t) To make and enter into any form of contract with members of the company and others, providing for payments to be made to the Company and from time to time or for certain specified times by such members or persons, and in such amounts as may be agreed, and in consideration therefor to give to such member, members or persons certain rights to loan, or other rights and privileges, with such provisions as to repayment of loans, interest, security, rights of redemption, re-purchase and cancellation and such other terms and conditions, and provisions as may be agreed upon.

(u) To carry on a general loan, mortgage and investment business with the members of the Company and others in all its branches.

(v) To advance or lend the capital or other moneys of the Company for the time being on the security of free-hold, leasehold, bills of exchange, promissory notes, bonds, agreements, goods, chattels or other property, real and personal, and in particular under the terms of the loan and investment contracts of the Company.

(w) Out of the moneys derived from the sale of

investment contracts or other moneys, to create special reserve or loan funds for the purpose of making loans and settling with contract holders or for any other purpose of the Company.

(x) To sell or dispose of loan or investment contracts of various classes and descriptions, providing for sharing of profits or otherwise.

The location of the principal office within the State of Oregon is at Number 721 Chamber of Commerce Bldg., in the City of Portland, Oregon, County of Multnomah.

The name of its Attorney in Fact, constituted and appointed in accordance with the provisions of Section 6 of "An Act to provide for the licensing of Domestic Corporations and Foreign Corporations, Joint Stock Companies and Associations, etc.," approved February 16, 1903, is A. D. Baker, whose business address is at Number 721 Chamber of Commerce Bldg., in the City of Portland, in the County of Multnomah, Oregon.

The names and addresses of its principal officers, and of its directors or trustees, are as follows:

NAMES	OFFICIAL POSITION	POSTOFFICE ADDRESS
G. E. Stillings	President	Winch Bldg., Vancouver, B. C. Room 926
Wm. Gardner	Treasurer	Rodgers Bldg., " "
C. P. Nellist	Secy.	Winch Bldg., Vancouver, B. C.
G. E. Stillings	Director	
Wm. Gardner	Director	

The name and residence of its General Agent within the State of Oregon is 721 Chamber of Commerce Bldg., Portland, Oregon.

In the County of Multnomah.

IN WITNESS WHEREOF, Said Corporation, in pursuance of a resolution duly adopted by its Board of (Corporate Seal) Directors has caused this declaration to be signed by its President and Secretary, and its Corporate Seal to be affixed the 1 day of June, 1914.

The National Mercantile Co., Ltd.

G. E. Stillings. (Seal).

..... (SEAL)

President.

C. P. Nellist (SEAL)

Secretary.

Dominion of Canada)

Province of British Columbia) ss.

County of Vancouver.)

I, G. E. Stillings, President, and I, C. P. Nellist, Secretary of The National Mercantile Company, Limited, being severally duly sworn depose and say, and each for himself say, that I am President and Secretary, respectively, of The National Mercantile Company, Limited, the corporation mentioned in and which executed the foregoing declaration, and that said declaration is a full, true and correct statement of the matters therein contained according to the best of my information, knowledge and belief.

GEORGE E. STILLINGS, Pres.

C. P. NELLIST, Secy.

Subscribed and sworn to before me this 1st day of June, 1914.

W. E. BURNS,

(Notarial Seal).

Dominion of Canada)

Province of British Columbia) ss.

County of Vancouver.)

I, C. P. Nellist, Secretary of The National Mercantile Company, Limited, being first duly sworn depose and say upon oath that George E. Stillings is the President of said corporation and that the signature affixed to the above and foregoing declaration is the genuine signature of said George E. Stillings; that the Corporate Seal hereinbefore attached and impressed herein is the Corporate Seal of said Corporation, and was affixed thereto by me, and that the foregoing declaration was executed for the National Mercantile Company, Limited by its President and its Secretary, pursuant to a resolution of the Board of Directors of said corporation duly adopted on the 1st day of June, 1914, so help me God.

C. P. NELLIST.

Subscribed and sworn to before me this 1st day of June, 1914.

W. E. BURNS.

(Notarial Seal).

“EXHIBIT A.”

EXHIBIT B.

KNOW ALL MEN BY THESE PRESENTS:

That The National Mercantile Company, Limited,

is a corporation duly organized under and by virtue of the laws of Prov. British Columbia, Canada, having its principal place of business in Vancouver, in the Prov. British Columbia.

That said The National Mercantile Company, Limited, has made, constituted and appointed, and does hereby make, constitute and appoint A. D. Baker, a citizen of the United States, and a citizen and resident of the State of Oregon, residing at Portland, Oregon, and whose place of business is No. 631 Chamber of Commerce Bldg., Street, its true and lawful Attorney in Fact and authorized Agent for it, and in its name, place and stead to make and accept all service of all writs, processes and summonses in any action, suit or proceeding in any of the courts of the State of Oregon, or United States courts therein, and upon whom all lawful writs, processes and summonses may be served with the same effect as though the company existed in the State of Oregon, requisite and necessary to give competent and complete jurisdiction of the said The National Mercantile Company, Limited, to any of the said courts;

GIVING AND GRANTING unto said A. D. Baker full power and authority to do and perform every act and thing requisite and necessary to be done in and about the premises, as fully to all intents and purposes as the said The National Mercantile Company, Limited, might or could do if personally present, hereby ratifying and confirming all that the said A. D. Baker shall lawfully do or cause to be done by authority thereof.

This Power of Attorney is irrevocable except by the

substitution of another qualified person for the one hereby appointed Attorney in Fact.

IN WITNESS WHEREOF, said corporation, in pursuance of a resolution duly adopted by its Board of (Corporate Seal) directors, has caused this instrument to be executed in its name by its President and Secretary, and its Corporate Seal to be hereto affixed the 12th day of May, 1914.

The National Mercantile Co., Ltd., (SEAL)

G. E. Stillings, President (SEAL)

The National Mercantile Co., Ltd

C. P. Nellist, Secretary (SEAL)

Dominion of Canada,)

Province of British Columbia,) ss.

County of Vancouver.)

THIS CERTIFIES, that on this 12th day of May, 1914, before the undersigned, a Notary Public in and for British Columbia, Canada, personally appeared the within named G. E. Stillings, the President, and C. P. Nellist, the Secretary of the National Mercantile Co., Ltd., the corporation mentioned in and which executed the foregoing Power of Attorney, and acknowledged that they executed the same by the authority and on behalf of said The National Mercantile Co., Ltd., pursuant to a resolution of the Board of Directors of said corporation, duly adopted on the 12th day of May, 1914, and C. P. Nellist, the Secretary of said The National

Mercantile Co., Ltd., further acknowledged that the Corporate Seal hereinbefore attached and impressed herein is the Corporate Seal of said Corporation and was affixed thereto by him.

IN TESTIMONY WHEREOF, I have hereunto set my hand and official seal this 12th day of May, 1914.

(L.S.)

Norman Roy Robertson,

(SEAL)

A Notary Public in and for the
Province of British Columbia.

EXHIBIT C.

I, Henry Esson Young, Provincial Secretary of the Province of British Columbia, Dominion of Canada, do hereby CERTIFY that Herbert Gascoigne Garrett is the duly appointed Registrar of Joint-Stock Companies, and that the signature and seal subscribed and affixed to the annexed instrument are the signature and seal of the said Herbert Gascoigne Garrett as such Registrar, and that as such Registrar he has in custody of his office the original documents of "THE NATIONAL MERCANTILE COMPANY, LIMITED."

GIVEN under my hand and Seal of

Office at the City of Victoria in

Provincial Secretary the Province of British Columbia,

(Official Seal) this eleventh day of June, One

British Columbia thousand nine hundred and four-
teen.

HENRY ESSON YOUNG,

Provincial Secretary.

I HEREBY CERTIFY that the annexed document is a true and correct copy of the Articles of Association of "THE NATIONAL MERCANTILE COMPANY, LIMITED" filed and registered on the 14th day of August, 1911, and the Memorandum of Association, as altered, filed and registered in this office on the 13th day of December, 1912.

Dated this 16th day of May, 1914.

H. G. Garrett,
Registrar of Joint-Stock Companies.

(Official Seal)

CONSULATE GENERAL OF THE UNITED
STATES OF AMERICA.

Vancouver, B. C., Canada.

June 12, 1914.

I, R. E. Mansfield, Consul General of the United States of America at Vancouver, B. C., Canada, duly commissioned and qualified, do hereby certify that Herbert Gascoigne Garrett is personally known to me; that he is a duly appointed and commissioned Registrar of Joint Stock Companies in and for the Province of British Columbia, to continue in office during the pleasure of the Government, and that to all his official acts full faith and credit are due and given.

In witness whereof I have hereunto set my hand and official seal the day and year above written.

R. E. Mansfield,

Consul General of the United States of America.

(Official Seal)

(Free stamp)

ARTICLES OF ASSOCIATION

OF

“THE NATIONAL MERCANTILE COMPANY
LIMITED.”

1. Subject as hereinafter provided, the regulations contained in table “A” in the first schedule of the Companies Act, 1910, hereinafter called table “A,” shall apply to this Company.

2. The Company may commence business notwithstanding that any part of the share capital may remain unallotted or unsubscribed.

3. Clauses 4, 35, 37, 38, 39 and 40 of Table “A” shall not apply.

4. If the Company shall offer any of its shares to the public for subscription the directors shall not make any allotment thereof unless and until at least ten per cent (10%) of the shares so offered shall have been subscribed and the sums payable on application shall have been paid to and received by the Company but this provision is no longer to apply after the first allotment of shares offered to the public for subscription has been made.

5. With the consent in writing of all the members for the time being a general meeting may be convened on a shorter notice than seven (7) days and in any manner they may think fit and clause (49) forty-nine of table “A” shall be modified accordingly.

6. Every share shall confer one vote and clause sixty (60) of table “A” shall not apply.

7. The number of the directors shall not be less than three (3) nor more than five (5).

8. The corporate seal shall never be used except by the authority of the directors or committee of the directors previously given, and in the presence of two directors at least, who shall sign every instrument to which the seal is affixed, and every such instrument shall be countersigned by the secretary or some other person appointed by the directors. Provided, however, in the case of ordinary usual and daily small contract matters and then only when previously authorized or sanctioned by the Board of Directors so to do, the Secretary alone shall have the authority to affix such seal.

9. The persons hereinafter named shall be the first directors that is to say; George Edward Stillings, Roy Arthur Campbell, John Ralph Vernon, Chester Frank Campbell and Edith Gertrude Stillings, all of the City of Vancouver.

10. The qualifications of a director shall be the holding of one share in the Company.

11. The first managing Director of the Company shall be George Edward Stillings of the City of Vancouver, Promoter and the first Secretary of the Company shall be Roy Arthur Campbell of the City of Vancouver, bookkeeper.

12. A resolution in writing signed by all the Directors shall be as valid and effectual as if it had been passed at a meeting of the Directors duly called and constituted.

We, the several persons whose names and addresses

are hereto subscribed agree to take the number of shares in the capital of the Company set opposite our respective names.

Names, addresses and occupations	No. of shares
	taken by each subscriber.
George Edward Stillings, Promoter	25.
Roy Arthur Campbell, Bookkeeper	1.
John R. Vernon, Contractor	1.
Chester Frank Campbell, Concealed Beds . .	1.
Edith Gertrude Stillings	1.
Total shares taken.	

Dated the 10th day of August, 1911.

Witness to the above signatures,

Name R. G. R. McKenzie,

Address, 619 Granville St., Vancouver, B. C.

Occupation, Barrister.

MEMORANDUM OF ASSOCIATION
OF
THE NATIONAL MERCANTILE COMPANY,
LIMITED.

1. The name of the Company is "THE NATIONAL MERCANTILE COMPANY, LIMITED."

2. The Registered Office of the Company will be situate in the City of Vancouver, Province of British Columbia.

3. The objects for which the Company is established are:

(a) To carry on the business of a storekeeper in all its branches, and in particular to buy, sell, manufacture and deal in goods, stores, consumable articles, chattels and effects of all kinds, both wholesale and retail, and to transact every kind of agency business and generally to engage in any business transaction which may seem to the Company, directly or indirectly, conducive to the interest or convenience of the Company's members or ticket-holders or their friends or any section thereof.

(b) To make arrangements with persons engaged in any trade, business or profession for the concession to the Company's members, ticket-holders, and their friends of any special rights, privileges and advantages and in particular in regard to the supply of goods.

(c) To buy, sell, manufacture, repair, alter and exchange, let or hire, export and deal in all kinds of articles and things, which may be required for the purposes of any of the said businesses or commonly supplied or dealt in by persons engaged in any of the said businesses or which may seem capable of being profitably dealt with in connection with any of the said businesses.

(d) To carry on the business of a co-operative store and general supply society in all its branches and to transact all kinds of agency businesses.

(e) To acquire and undertake the whole or any part of the business, property and liabilities of any persons or company carrying on any business which the Company is authorized to carry on.

(f) To enter into any arrangement for sharing

profits, union of interest, co-operation, joint adventure, reciprocal concession or otherwise, with any person or company carrying on or engaged in or about to carry on or engage in any business or transaction which this Company is authorized to carry on or engage in, or any business or transaction capable of being conducted so as directly or indirectly to benefit the Company; and to lend money, guarantee the contracts of or otherwise assist any such person or company and to take or otherwise acquire shares and securities of any such Company and to sell, hold, re-issue, with or without guarantee or otherwise deal with the same.

(g) To take or otherwise acquire and hold shares in any other company having objects altogether or in part similar to those of this Company or carrying on any business capable of being conducted so as, directly or indirectly to benefit this Company.

(h) To promote any Company or companies for the purpose of acquiring all or any of the property and liabilities of this Company or for any other purpose which may seem, directly or indirectly, calculated to benefit this Company.

(i) Generally to purchase, take on lease or in exchange, hire or otherwise acquire any real and personal property and any rights or privileges which the Company may think necessary or convenient for the purpose of its business.

(j) To construct, maintain and alter any buildings or works necessary or convenient for the purposes of the Company.

(k) To invest and deal with the moneys of the Company not immediately required in such manner as may from time to time be determined.

(l) To borrow, raise or secure the payment of money in such manner as the Company shall think fit and in particular by the issue of debentures or debentures stock charged upon all or any of the Company's property, including its uncalled capital and to purchase, redeem and pay off any such securities.

(m) To remunerate any person or Company for services rendered or to be rendered in placing or assisting to place or guaranteeing the placing of any of the shares of the Company's capital or any debentures or other securities of the Company or in or about the formation or promotion of the Company or the conduct of its business.

(n) To draw, make, accept, endorse, discount, execute, and issue promissory notes, bills of exchange, bills of lading, warrants, debentures and other negotiable or transferable instruments.

(o) To sell or dispose of the undertaking of the Company or any part thereof for such consideration as the Company may think fit and in particular for shares, debentures or securities of any other Company having objects altogether or in part similar to those of this Company.

(p) To adopt such means of making known the products of purpose of the Company as may seem expedient and in particular by advertising in the press, by circulars, by purchase and exhibition of works of art or

interest by publication of books and periodicals and by granting prizes and donations.

(q) To sell, improve, manage, develop, exchange, lease, mortgage, dispose of, turn to account, or otherwise deal with all or any part of the property and rights of the Company.

(r) To do all or any of the above things as principals, agents, contractors, trustees or otherwise and by or through trustees, agents, or otherwise and either alone or in conjunction with the others.

(s) To do all such other things as are incidental or conducive to the attainment of the above objects or any of them.

(t) To make and enter into any form of contract with members of the Company and others, providing for payments to be made to the Company and from time to time or for certain specified times by such member, members or persons, and in such amounts as may be agreed and in consideration therefore to give to such member, members or persons certain rights to loan, or other rights and privileges, with such provisions as to repayment of loans, interest, security, rights of redemption, re-purchase and cancellation and such other terms, conditions, and provisions as may be agreed upon.

(u) To carry on a general loan, mortgage and investment business with the members of the Company and others in all its branches.

(v) To advance or lend the capital or other moneys of the Company for the time being on the security of free-hold, leaseholds, bills of exchange, promissory notes,

bonds, agreements, goods, chattels or other property, real and personal, and in particular under the terms of the loan and investment contracts of the Company.

(w) Out of the moneys derived from the sale of investment contracts or other moneys, to create special reserve or loan funds for the purpose of making loans and settling with contract-holders or for any other purpose of the Company.

(x) To sell or dispose of loan or investment contracts of various classes and descriptions, providing for sharing of profits or otherwise.

4. The Liability of the Members is Limited.

5. The Share Capital of the Company is Ten Thousand Dollars (\$10,000.00) divided into One Hundred Shares (100) of One Hundred Dollars (\$100.00) each.

We, the number of persons whose name and addresses are subscribed, are desirous of being formed into a Company in pursuance of this Memorandum of Association, and we respectively agree to take the number of shares in the capital of the Company set opposite our respective names.

Names, addresses and occupations of subscribers.	No. of shares taken by each subscriber.
George Edward Stillings, Promoter.....	25.
Roy Arthur Campbell, Bookkeeper	1.
John R. Vernon, Contract.....	1.
Chester Frank Campbell, Concealed Beds..	1.
Edith Gertrude Stillings	1.
Total shares taken.	

Dated this 10th day of August, 1911.

Witness to the above signatures:

Name: R. G. R. McKenzie.

Address: 619 Granville St., Vancouver, B. C.

Occupation: Barrister.

DISTRICT OF OREGON,)
) ss.

County of Multnomah.)

I, George E. Stillings, being first duly sworn, depose and say that I am the President of the National Mercantile Co., Ltd., plaintiff in the above entitled suit and that the foregoing supplementary complaint is true as I verily believe.

George E. Stillings,

Subscribed and sworn to before me this 15th day of
June, 1914.

(Seal)

George Rossman,

Notary Public for the State of Oregon.

DISTRICT OF OREGON,)
) ss.

County of Multnomah.)

Due service of the within Supplemental Complaint is hereby accepted in Multnomah County, Oregon, this 19th day of June, 1914, by receiving a copy thereof,

duly certified to as such by George Rossman one of attorneys for plaintiff.

John M. Pipes,
Attorney for Defendants.

Walter H. Evans,
District Attorney Multnomah County.

By Arthur A. Murphy, Deputy.

Filed June 19, 1914. A. M. Cannon, Clerk.

And afterwards, to-wit, on the 22nd day of June, 1914, there was duly filed in said Court, and cause an **ANSWER OF R. A. WATSON**, in words and figures as follows, to-wit:

ANSWER OF R. A. WATSON.

Comes now the defendant R. A. Watson, and as a plea in abatement to the bill herein, alleges the following facts, to-wit:

I.

That the plaintiff has never been and is not now a corporation organized or existing under the laws of the State of Oregon; that since October, 1912, it has been engaged and is now engaged in business in making loans and taking mortgages within the State of Oregon, all as alleged and described in the bill of complaint, but that it has not at any time prior to or since the commencement of this suit complied with the laws of the State of Oregon, and particularly Section 6707, Lord's Oregon Laws, Vol. III, page 2407, in this: That it has not at any time furnished or offered to the Secretary of State,

upon blanks to be supplied by the said Secreary, or otherwise, a correct or any statement, sworn to by one of the officers of plaintiff, or the managing agent, or authorized attorney in fact, or otherwise, before an officer duly authorized to administer oaths, or otherwise, or setting forth the name of the plaintiff, or the location of its principal office, or the names of its president or secretary or treasurer, or with the postoffice address of each or either, or the date of the annual election of directors or officers of such corporation, or the amount of the authorized capital stock, or the number of shares or par value of each share, or the amount of capital stock subscribed, or the amount of capital stock issued, or the amount of capital stock paid up, or any statement giving the names or postoffice addresses of its managing agents or attorneys in fact in the State of Oregon; and it has not complied with the other provisions of the said Section in any respect, but which provisions are not herein specifically referred to for the reason that the other provisions of the Section have been declared to be unconstitutional by the Supreme Court of the State of Oregon in the case of **HIRSCHFELD v. McCULLOUGH**, 130 Pac. 1131.

The plaintiff has not complied with the laws of the State of Oregon, and particularly Section 6726, Lord's Oregon Laws, Vol. III, page 2413, in this: That the plaintiff has not duly or otherwise executed or acknowledged a power of attorney, or caused any power of attorney to be recorded in the office of the Secretary of State, appointing a person, a citizen of the United States, or a citizen or resident of this state, or otherwise, as attorney

in fact for the plaintiff, and has not, at any time, appointed or maintained any person, qualified or otherwise, as its attorney in fact.

And the plaintiff has not complied with Section 6727 of Lord's Oregon Laws, Vol. III, page 2414, in this: That it has not filed with the Secretary of State, or the defendant as Corporation Commissioner, a written or other declaration of its desire or purpose to engage in business within this State, or setting forth any name under which it proposes to transact business, or the name of the State or country under whose laws it was organized, or the location of its home office, or the date of its formation or incorporation, or the amount of its capital stock, or the nature of the pursuit, business or occupation in which it is authorized to engage, or the location of its principal office within this State, or the name of any attorney in fact, or the names or addresses of its principal officers, or of its direction or trustees, or the name or residence of its general agent within the State of Oregon, or any accompanying certified or other copy of its charter or articles of incorporation, either certified by the legal keeper of the original, or otherwise, or by the United States Ambassador, Minister, Consul-General, Vice-Consul, or Charge D'Affaires of the foreign country under whose jurisdiction the plaintiff was or claims to have been formed, or any certificate of such officer that he has the requisite official knowledge as to whether such charter or articles of incorporation are of a genuine, valid or subsisting character, or that such copy was duly certified by the officer having the legal custody of the original. And this plaintiff has not com-

plied with the said last named Section, in this: That it has not, at any time, offered or paid to the secretary of State, or to the defendant as Corporation Commissioner, the sum of \$50.00, or any part thereof, required by the said Section, for filing and recording the said papers. And the plaintiff has not complied with the act of the Legislature of 1913, General Laws of Oregon, 1913, page 772, in that it has not paid or offered the annual license fee of \$100.00 therein provided to be paid. By reason of the premises the plaintiff has not been authorized to transact any of the business which it has transacted, and is not authorized to transact any further business in the State of Oregon, and is not authorized to maintain this suit, for that Section 6708, Lord's Oregon Laws, Vol. III, page 2408, provides in effect that a failure of a foreign corporation to pay any fee which shall have become due and payable against it as provided in the said act, or any law of the State, prohibits it from maintaining any suit, action or proceeding in any court of justice within the State while such delinquency should continue; and for that the said Section 6726 provides in effect that a failure to appoint an attorney in fact, as provided in said Section, as aforesaid, prohibits the plaintiff from transacting any business within this State, or maintaining any action, suit, or proceeding in its courts. And the defendant further alleges that neither the Secretary of State, nor this defendant as Corporation Commissioner, has issued to the plaintiff any certificate to the effect that the plaintiff has filed a declaration required by the said Sections as aforesaid.

II.

And further answering the bill in this case, upon the merits, the defendant says that he has no information sufficient to form a belief as to whether the plaintiff is a corporation organized or existing under the laws of the Province of British Columbia, Dominion of Canada, or has its general offices or principal place of business in the City of Vancouver, Province of British Columbia, Dominion of Canada, and leaves the said allegation to be proved.

III.

The defendant denies that this is a suit between citizens of different states.

IV.

The defendant admits that the plaintiff is engaged in the business of loaning money upon mortgage security upon real property, and that the contracts it makes are in form as marked "Exhibit 1" of the bill of complaint; and that the application therefore is as "Exhibit 2" of the bill of complaint, and the application from A. D. Baker to the complainant is as "Exhibit 3" of the bill of complaint; and that the plaintiff issues such contracts to prospective borrowers, and that the borrowers are placed in groups of one hundred in the consecutive order of the signing of the contracts, and upon the accumulation of sufficient funds in the loan fund of the plaintiff, the borrowers become entitled under such proposed contracts to loans in their consecutive order.

The defendant admits that the plaintiff maintains offices in many cities of the different states of the United

States of America, and also in many cities of the various provinces of the Dominion of Canada, and appoints agents who have charge of certain allotted amounts of territory.

The defendant admits that the borrower is required to sign an application as stated in the bill, a copy of which is "Exhibit 2," which is presented to the plaintiff's representative, and at the same time the said representative places an application with the plaintiff for the loan.

The defendant admits that the general agent of the plaintiff in Oregon is A. D. Baker, and that his office address is Room 723 Chamber of Commerce Building, Portland, Oregon, in which city and state he regularly resides. He admits that when the application is approved by the plaintiff, plaintiff issues to the said A. D. Baker an undertaking, under seal, whereby the plaintiff, in consideration of the payment of 1/100 of the amount of the desired loan each month, undertakes and agrees to pay to the said A. D. Baker the amount of the loan desired as soon as the loan fund of the plaintiff contains a sufficient amount of money to make up the said loan; that the said undertaking, by express terms, is assignable, and the said A. D. Baker, upon the receipt of the said undertaking, at once assigns the same over in writing to the prospective borrower, who thereupon makes his payments to the said Baker, or to the plaintiff, at the option of the borrower. But in this connection the defendant alleges that the last named provisions of the said contract and of the said plan of plaintiff constitute a device by which it is sought to make it appear that the loans are made by the Company in its home office with

A. D. Baker in Oregon, so as to claim that it is not doing the said business within the State of Oregon; but that in truth and in fact the said A. D. Baker is the agent of the plaintiff, residing and doing business within the State of Oregon, as alleged in the complaint, and as admitted in this answer.

The defendant admits that the loan fund of the plaintiff is composed of the monthly installments, together with repayments of the various loans made by it, and that the loans made by the plaintiff to its various borrowers are secured by mortgages upon real property in Oregon, or wherever its borrowers live, and that they draw three per cent annual interest. The defendant admits that the said loans are repaid to the plaintiff by the borrowers in monthly installments of seventy cents per month of each one hundred dollars borrowed, with interest at three per cent; that the plaintiff likewise sells the people in Oregon, and elsewhere, matured contracts, ready for loans, which loans when made pay to plaintiff five per cent. annual interest; and that the application for loans, as soon as received by plaintiff, are at once given a consecutive number in the order of their receipt, and are placed in classes of one hundred. But whether the payments made upon the groups of contracts of one hundred are kept in individual funds, or whether the contract holder in each group of one hundred having the oldest date is the first to secure a loan, or whether thereafter the loans are made in the chronological order of the issue of the contracts, the plaintiff has no knowledge or information sufficient to form a belief, and leaves the said allegations to be proved to the satisfaction of the Court.

V.

The defendant admits that the home office is, and some of the business affairs of the plaintiff are conducted in the City of Vancouver, Province of British Columbia, Dominion of Canada; but denies that the said affairs are administered in accordance with the laws or regulations of the said alleged sovereignty, or that they are all or any of them conducted in lawful, honest or meritorious manner.

VI.

The defendant admits that the plaintiff, by its agents and representatives, is offering in the State of Oregon to take applications for loans, and to enter into contracts with borrowers for loans; and that plaintiff, by advertisement and otherwise, professes the business of taking applications for loans and making such loans, and entering into contracts for such loans, and that it is engaged in such business in the State of Oregon, as alleged in Paragraph VI of the bill of complaint. That the taking of such applications and the making of such contracts are in the course of continuous and successive transactions of a similar nature, and that the plaintiff is not, in taking applications and making such loans, acting in a trust capacity created by law.

VII.

The defendant admits that the plaintiff has been engaged in the said loan business since the month of October, 1912, and since that time it has vigorously conducted its said business. The defendant denies that plaintiff has invested large or any sums of money in said business,

but alleges in that regard that the money that it has consists solely of the payments of the monthly installments of the borrowers, as provided in the said contract, "Exhibit 1" of the bill of the plaintiff.

As to whether the plaintiff has acquired mortgages or other securities of great value, or has outstanding a large or any number of contracts of great or any value, of the kind described in the preceding paragraphs, the defendant has no knowledge or information sufficient to form a belief, and leaves the said allegations to be proved to the satisfaction of the Court.

The defendant admits that the plaintiff has contracted from time to time to make such loans of the kind described in "Exhibit 1."

VIII.

The defendant has no knowledge or information sufficient to form a belief as to whether the plaintiff has expended or invested large or any sums of money in advertising, or in the establishment of its said business, or has acquired, in the course of such business, a valuable good-will or an extensive clientele, or has acquired valuable information as to the conduct of its business, or information as to the names and addresses of persons, firms and corporations who desire loans of the character described in the bill, or whether it has acquired such valuable good-will, information or other property, as above described, in the State of Oregon, and therefore submits the said allegations to be proved to the satisfaction of the Court.

The defendant admits that the plaintiff sends into the State of Oregon its agents and employees, to there

solicit applications for loans, and transmit the said applications to the plaintiff in Vancouver, British Columbia, and make the said loans in the State of Oregon; and admits that the said application are accepted by plaintiff in Vancouver, British Columbia, and that said contracts are then forwarded to the contract holders in Oregon, but whether from the offices of the plaintiff in Vancouver, British Columbia, the defendant has no knowledge or information sufficient to form a belief, and leaves the said allegation to be proved.

IX.

The defendant denies that the representations made by the plaintiff, or by its agents and representatives, as to the contracts and applications therefor, and loans, are true representations.

X.

The defendant says that it has no information sufficient to form a belief as to whether or not the plaintiff has been, or now is, solicited by various persons, firms or corporations, to secure applications for loans, and loans, as described in the bill, or that it has contracted to make such loans, or that the owners of such contracts therefor have undertaken or agreed to pay the plaintiff a compensation for such loans, and therefore leaves the said allegations to be proved to the satisfaction of the Court.

XI.

Defendant admits that the plaintiff and those with whom it has agreements have been informed that the said loans described in the bill cannot be made in Ore-

gon, unless full compliance is made by the plaintiff with Chapter 341, General Laws of Oregon for 1913, which became effectual on the 3rd day of June, 1913.

XII.

The defendant admits the allegations of the provisions of the act of the Legislature of 1913, as set forth in the bill of complaint, entitled "An Act to protect purchasers of stocks and bonds and prevent fraud in the sale thereof; to create a corporation department to administer this and other laws relative to the regulation and supervision of corporation, and providing penalties for the violation hereof," and that "Exhibit A" attached to the bill is a correct copy of the said law.

XIII.

Admits that the defendant, as Corporation Commissioner, has declared publicly his intention to enforce the provisions of said act, and his intention to prevent any sale or offer for sale in Oregon of securities covered and regulated by said act, and as to which the issuer thereof or the seller thereof has not in all respects complied with said act, and has declared his intention to enforce the penalties in said act set forth for any violation thereof; and admits that he caused the arrest, upon warrant for the arrest of the said A. D. Baker, General Representative, and the said George E. Stillings, President of the plaintiff, and of C. H. Hune and O. Sundberg, Local Representatives of the plaintiff in Lane County, Oregon, and that the said arrests were made upon the complaint of the said Corporation Commissioner, and prosecuted by the District Attorneys in the

respective counties in which the arrests were made, and that all said arrests were made for soliciting applications for loans from the plaintiff in the manner set forth in said bill, and for the violation of the terms of the said act.

XIV.

Admits that the defendant issued the bulletin which is "Exhibit B" of the bill, and has prepared for use a preliminary report, Sheet 1, and a preliminary report, Sheet 2, which are "Exhibits C and D" of the bill, and the blanks, all as alleged in the bill of complaint, and has prepared for use application blanks and report blanks, which are "Exhibits E and F" of the bill; and admits that the said preliminary reports, "Exhibit C" and "Exhibit D," require the information set forth in paragraph XXXVI of the bill, and the subdivisions thereof; but denies that any right or property right of the plaintiff is invaded or destroyed, or its freedom to contract curtailed, impaired or destroyed, or that it is otherwise damaged in its business or property by reason of the said act of the Legislature, or the said act of the defendant.

XV.

Admits that the defendant has issued the "Application of Stock Broker," a copy of which is "Exhibit E" of the bill.

XVI.

In respect of the allegation of the bill that the said act of the Legislature is unconstitutional and void, the defendant denies the conclusions stated in the said allegations, but is advised that, being allegations concerning

questions of law only and not of fact, he is not required to answer specifically each of the said contentions; but alleges on the contrary that the said act is in none of its provisions contrary to the Constitution of the United States, or of the State of Oregon.

XVII.

Defendant denies that any immediate or irreparable or other injury will be caused to the plaintiff by reason of the enforcement of said act.

XVIII.

And further answering the said bill, the defendant alleges that George E. Stillings is the president of the plaintiff, and the principal owner and controller of its business; that it was organized by him, and that the plaintiff is the instrument of the said George S. Stillings through and by which to operate his plan and scheme. That the plan and scheme set forth in the bill is not an honest plan or scheme, but is devised and operated for the purpose of defrauding the general public of the State of Oregon. That the said plaintiff, operated and controlled by the said George E. Stillings as aforesaid, intends, in its operation, to defraud its customers, and that the plan and scheme as actually operated in the State of Oregon is fraudulent in purpose and fact. That the purpose and intent of the plaintiff as aforesaid is to collect large sums of money from its customers, and to pretend to charge large sums for operating expenses and for the salaries of the said George E. Stillings and his confederates, so that the said customers will not be entitled to have or receive the money that they pay on their said pretended contracts.

And in support of this allegation, and based upon the information hereinafter referred to, this defendant alleges that the said George E. Stillings, in 1903, organized, in the State of Missouri, a corporation called the Preferred Tontine Mercantile Company, and purported to do a business upon contracts similar in form to those set out in the bill of complaint, and containing therein the same or similar provisions concerning the incurring of expenses, and that the Attorney General of Missouri brought an action against the said Preferred Tontine Mercantile Company to restrain the Company from doing business in that State, and that the Supreme Court of the State of Missouri, on July, 1, 1904, in a decision reported in 82 Southwestern Reporter, page 1075, held that the business of the said Company was in violation of the laws of Missouri, and ordered the appointment of a Receiver.

That thereafter, the said George E. Stillings and his brother organized a corporation in Massachusetts, called the Preferred Mercantile Company of Boston, and that the Attorney General of the State of Massachusetts brought a suit against the said Company, in the nature of quo warranto, and alleging that the said Company was engaged in an unlawful business, and that the said cause resulted in a decision of the Supreme Judicial Court, reported in 187 Massachusetts, page 516, declaring that the business carried on by the Company was illegal, and, on March 14, 1905, an order was duly entered forfeiting the Company's charter. That the Special Master trying the said cause found that the said George E. Stillings was guilty of falsifying the books

of the Company and of converting the funds thereof, and upon the said report the Company was ousted from its franchises. The said defendant was also imprisoned for contempt of the said court in disobeying its orders. That the United States postal authorities, in 1904, prohibited the use of the mails to the Preferred Mercantile Company, and defendant is informed and believes that said George E. Stillings was indicted and convicted for using the United States mails to defraud, under a contract and proceeding similar in plan and conduct to the contract and plan involved in this suit.

And based upon the foregoing facts, and many others connected with the history of the said George E. Stillings and his companies, as aforesaid, this defendant charges and avers that the business of the plaintiff, which it seeks to continue under the protection of this Court, is not an honest business, but a fraudulent one, and that it is not entitled to the protection of this Court in the prosecution of its said business.

WHEREFORE, the defendant prays that the bill of complaint be dismissed as against this defendant, and that he have judgment against the complainant for his costs and disbursements.

Martin L. Pipes,

John M. Pipes,

George A. Pipes,

Solicitors for said Defendant.

STATE OF OREGON,)

) ss.

County of)

I, R. A. Watson, first being duly sworn, depose and

AFFIDAVIT OF GEORGE E. STILLINGS.

STATE OF OREGON,)
) ss.
County of Multnomah.)

I, George E. Stillings, being first duly sworn, upon my oath depose and say:

That I have read over and understand the contents of that certain printed pamphlet, marked "Exhibit A," and attached to the affidavit of defendant R. A. Watson, wherein one Burton Payne Gray, as Receiver, purports to give the legal history of the Preferred Mercantile Company; that the said Gray is a professional receiver; and that, insofar as the said history thus compiled by the said Gray attempts to cast a reflection upon my honesty and integrity, or the honesty and integrity with which I managed the affairs of the said Preferred Mercantile Company, the same is wholly untrue, and contrary to the facts; that the said report, in numerous instances, and in many of the items set forth therein is contrary to the facts.

That The National Mercantile Company, Limited, the above named complainant in the present suit, is licensed to do business in the State of Massachusetts, and has been licensed for more than a year, and is actively engaged in selling its contracts in the State of Massachusetts in the same manner in which it has attempted to do business in the State of Oregon. That it is well known in Massachusetts that I am president of said The National Mercantile Company, Limited, and the same commissioner of corporations is in office now as was in

office when I was president of said Preferred Mercantile Co. mentioned in said history, and at the time when he licensed said plaintiff he knew all of said facts above set forth.

That as president of The National Mercantile Company, Limited, up to the month of October, 1913, I received as my salary the sum of \$150.00 per month, as payment in full of all services performed as such official, and since the said month of October, 1913, I have received, and now receive, \$200.00 per month as payment in full of my said services as said president, and receive from said plaintiff no money of any other kind or nature whatsoever, save and except my actual traveling expenses when traveling on behalf of the said plaintiff, which traveling expenses must be accounted for in detail to the said plaintiff and approved by the board of directors. That no one else receives any larger salary than mine, or anything on my behalf.

That the said plaintiff up to the present time has paid no dividends upon its stock of any kind or nature whatsoever.

That out of the expense fund of the company the sum of \$11,000.00, under and pursuant to Section 23 of the said contract, has been transferred from the expense fund to the loan fund of the said plaintiff, and has been paid, in due course of business to its contract holders.

(Sgd.) George E. Stillings,

Subscribed and sworn to before me this 15th day of June, 1914.

George Rossman,
Notary Public for Oregon.

(Seal)

AFFIDAVIT OF GEORGE E. STILLINGS.

STATE OF OREGON,)
) ss.
County of Multnomah.)

I, George E. Stillings, being first duly sworn, upon my oath depose and say:

That I am the president of the National Mercantile Co., Ltd., above named, and am personally familiar with all of the matters and things herein set forth.

That up to the date hereof the total expenses of the said National Mercantile Co., Ltd., have not exceeded seven and one-half of one per cent ($7\frac{1}{2}\%$) of the amount paid in to the said company by its contract holders prior to the time when such contract holders secure their loans, including the first four payments, and that twenty per cent and the first four payments as allowed by the contract has never been necessary nor consumed.

That the said first four payments have been amply sufficient to provide for and discharge the current expenses of the said company, which cover all ordinary expenses, such as agents' commissions, printing, office, advertising, salaries, and agency expenses, etc.; and that the total expenses of the said company, including all of the above, and such extraordinary expenses as litigation, have not exceeded seven and one-half per cent, as stated above. That \$11,000.00 has been taken out of the expense fund and been placed in the loan fund.

That the said period of time just mentioned has been the period during which the said company has started its business, and owing to that fact its expenses upon

expenses include all expenses, except such extraordinary expenses as litigation.

That the statement attached hereto, and marked "Exhibit A" is a true statement of the affairs of the said National Mercantile Co., Ltd., taken by me from the books of the said company, and filed in compliance with the law, with the Minister of Finance of British Columbia.

Wm. T. Stein.

Subscribed and sworn to before me this 22nd day of June, 1914.

George Rossman,
Notary Public for Oregon.

(SEAL)

NATIONAL MERCANTILE CO., LTD.

BALANCE SHEET as at 31st December, 1913.

CAPITAL and LIABILITIES.

1. Liabilities to the Public

Sundry Creditors	\$ 79.36
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2. Liabilities to the Shareholders

Capital

Authorized—100 shares of

\$100 each	\$10,000.00
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Issued—80 shares of \$100

each fully paid	8,000.00
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Reserve	854.14
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Excess of Assets over Lia-

bilities	757.17
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Advances from Shareholders. 3,580.81 13,192.12

3. Trust Accounts

Loan & Reserve Fund, Con-
tracts Matured\$22,500.00
Loan & Reserve Contracts
Not Matured 10,112.48
Investment Contracts 2,300.64
Mortgage Loan Repayments 511.00 35,424.12

Contingent Liabilities

Balance unpaid on shares pur-
chased 500.00

\$48,695.60

ASSETS.

1. Capital Account

Deposit Account\$ 2,418.87
Furniture at Head Office &
Agencies 1,537.00
Organization Expense 8,000.00
Advertising Matter &
Agency Supplies on hand 800.00
Bills Receivable 312.00 \$13,067.87

2. Trust Account

Cash on Hand and in Bank.\$ 9,169.73
Shares in other Companies.. 375.00
Loans on Collateral Security 3,058.00
Loans on Real Estate 22,500.00

Contracts for Loans Matured	525.00	35,627.73
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\$48,695.60

STATE OF OREGON,)

) ss.

County of Multnomah.)

Due service of the within affidavits and the receipt of a copy thereof duly prepared and certified to by George Rossman one of the attorneys for plaintiff is hereby admitted at the City of Portland in said County and State, this 22nd day of June, 1914.

Martin L. Pipes,

Attorney for Defendant Watson.

Filed June 22, 1914. A. M. Cannon, Clerk.

And afterwards, to-wit, on the 22nd day of June, 1914, there was duly filed in said Court, and cause an **AFFIDAVIT OF WILLIAM T. STEIN**, in words and figures as follows, to-wit:

AFFIDAVIT OF WILLIAM T. STEIN.

In the Province of British Columbia)

) ss.

County of Vancouver.)

I, Wm. T. Stein, of the City of Vancouver, in the Province of British Columbia, make oath and say:

That I am a chartered accountant and a member of the firm of W. T. Stein & Company, carrying on business in the City of Vancouver, B. C.

That I have prepared a statement of 100 contracts of \$1,000.00 each, in a series where the net monthly installments are maintained at \$800.00, by adding additional contracts to fill vacancies caused by contracts maturing. The statement is hereto attached marked Exhibit "A," hereby referred to and made a part of this affidavit, and is based upon the plaintiff Company's contract, which provides that the initial and three subsequent payments are used as an Expense Fund. And have further allowed an expense fund of 20 per cent on all subsequent collections. And that the result is that the last contract of the first \$100,000.00 will mature in the 89th month from the first payment. Contracts which mature each month are shown on detailed statement marked Exhibit "A." And I further state that said table shown in Exhibit "A" does not allow or take into consideration any lapses, paid-up certificates, savings on expense fund or use of surplus funds, but, it is, in fact, the minimum result which could be attained by such contracts as the plaintiff company use. It is further demonstrated by the statement submitted (Exhibit "A") that during the first 10 months (6 to 15 inclusive) contracts mature for \$9,000.00, while during the final ten months (80 to 89 inclusive) contracts mature for \$16,000.00, showing that the period of time required to mature a contract is rapidly becoming shorter.

I have further calculated that in a series maintained at \$100,000.00, as aforesaid, if contracts are matured at the rate of four a month, \$100,000.00 will mature each 25 months and there will have been received 25 monthly payments on each contract before maturity. That is

\$250.00, and on four contracts \$1,000.00. To mature four contracts it will be necessary to repay these installments of \$1,000.00 and to loan four Mortgages of \$750.00 each at 3 per cent. per annum, being \$3,000.00 and making a total of \$4,000.00. These mortgages are repayable at the rate of \$7.00 per month, and will extend over a period of 107 months. The total amount of interest to be received by the Company on each mortgage for \$750.00 will be \$111.40, as shown on statement attached hereto marked Exhibit "B," and made part of this affidavit.

A further statement, marked Exhibit "C" is attached hereto, showing the amounts which will be received each month where mortgages are loaned at the rate of four per month, extending over the period for the repayment of the same, that is 107 months. This table shows that for one contract matured monthly during a term of 107 months, loaned on mortgage, there will be derived a monthly collection of \$861.40, and on four contracts this would amount to \$3,445.60.

The monthly repayments (including principal	
and interest on mortgages are shown in	
Exhibit "C" as	\$3,445.60
Monthly installments of \$10.00 each, on 100	
contracts to maintain series	1,000.00
	<hr/>
	\$4,445.60

On which the Expense Fund would be:

Initial and three subsequent pay-	
ments	\$160.00
20% on \$840.00	168.00 328.00
	<hr/>

Collections for month\$4,117.60

From which the Company requires to mature

four contracts of \$1,000.00 each.....\$4,000.00

The expense fund of \$328.00 on collections of \$4,-
445.60 is less than $7\frac{1}{2}$ per cent.

Wm. T. Stein.

Subscribed and sworn to before me this 4th day of
June, 1914, at the City of Vancouver, in the Province of
British Columbia.

Alex. D. Wilson,

A Notary Public for taking Affidavits
in the Province of British Columbia.

(Notarial Seal)

EXHIBIT A.

NATIONAL MERCANTILE CO., Ltd.

Loan Fund for Series of 100 Contracts (Maintained
at 100)

Month	Loan	Total	Month	Loan	Total
6	\$1,000.00	\$1,000.00	49	\$2,000.00	\$44,000.00
7	1,000.00	2,000.00	50	1,000.00	45,000.00
8	1,000.00	3,000.00	51	1,000.00	46,000.00
9	1,000.00	4,000.00	52	1,000.00	47,000.00
11	1,000.00	5,000.00	53	1,000.00	48,000.00
12	1,000.00	6,000.00	54	2,000.00	50,000.00
13	1,000.00	7,000.00	55	1,000.00	51,000.00
14	1,000.00	8,000.00	56	1,000.00	52,000.00
15	1,000.00	9,000.00	57	1,000.00	53,000.00
16	1,000.00	10,000.00	58	2,000.00	55,000.00
18	1,000.00	11,000.00	59	1,000.00	56,000.00

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Month	Loan	Total	Month	Loan	Total
19	1,000.00	12,000.00	60	1,000.00	57,000.00
20	1,000.00	13,000.00	61	2,000.00	59,000.00
21	1,000.00	14,000.00	62	1,000.00	60,000.00
22	1,000.00	15,000.00	63	1,000.00	61,000.00
23	1,000.00	16,000.00	64	2,000.00	63,000.00
24	1,000.00	17,000.00	65	1,000.00	64,000.00
25	1,000.00	18,000.00	66	1,000.00	65,000.00
26	1,000.00	19,000.00	67	2,000.00	67,000.00
27	1,000.00	20,000.00	68	1,000.00	68,000.00
28	1,000.00	21,000.00	69	1,000.00	69,000.00
29	1,000.00	22,000.00	70	2,000.00	71,000.00
30	1,000.00	23,000.00	71	1,000.00	72,000.00
31	1,000.00	24,000.00	72	2,000.00	74,000.00
32	1,000.00	25,000.00	73	1,000.00	75,000.00
33	1,000.00	26,000.00	74	2,000.00	77,000.00
34	1,000.00	27,000.00	75	1,000.00	78,000.00
35	1,000.00	28,000.00	76	2,000.00	80,000.00
36	1,000.00	29,000.00	77	1,000.00	81,000.00
37	1,000.00	30,000.00	78	2,000.00	83,000.00
38	1,000.00	31,000.00	79	1,000.00	84,000.00
39	1,000.00	32,000.00	80	2,000.00	86,000.00
40	1,000.00	33,000.00	81	1,000.00	87,000.00
41	1,000.00	34,000.00	82	2,000.00	89,000.00
42	1,000.00	35,000.00	83	1,000.00	90,000.00
43	2,000.00	37,000.00	84	2,000.00	92,000.00
44	1,000.00	38,000.00	85	2,000.00	94,000.00
45	1,000.00	39,000.00	86	1,000.00	95,000.00
46	1,000.00	40,000.00	87	2,000.00	97,000.00
47	1,000.00	41,000.00	88	1,000.00	98,000.00
48	1,000.00	42,000.00	89	2,000.00	100,000.00

EXHIBIT B.

NATIONAL MERCANTILE CO., LTD.

Table of Principal and Interest on a Mortgage of
\$750.00 at 3% per annum.

Months progressive	Months	Amount due	Yearly repayment	3% interest	Total Yearly payments	Average Monthly payments
12	12	\$750.00	\$84.00	\$22.80	\$106.80	\$8.90
12	24	666.00	84.00	19.80	103.80	8.65
12	36	582.00	84.00	17.40	101.40	8.45
12	48	498.00	84.00	15.00	99.00	8.25
12	60	414.00	84.00	12.60	96.60	8.05
12	72	330.00	84.00	9.60	93.60	7.80
12	84	246.00	84.00	7.20	91.20	7.60
12	96	162.00	84.00	4.80	88.80	7.40
10	106	70.00	70.00	2.00	72.00	7.20
1	107	8.00	8.00	.20	8.20	8.20
			<hr/>	<hr/>	<hr/>	
			\$750.00	\$111.40	\$861.40	

EXHIBIT C.

NATIONAL MERCANTILE CO., LTD.

Maturity of Mortgages for \$750.00, Standard Month.

Month loaned	Monthly payment	Principal	Interest	Installment	Four contracts matured, total
1	107	\$8.00	.20	8.20	32.80
2	106	7.00	.20	7.20	28.80
3	105	7.00	.20	7.20	28.80
4	104	7.00	.20	7.20	28.80
5	103	7.00	.20	7.20	28.80

Month loaned	Monthly payment	Principal	Interest	Installment	Four contracts matured, total
6	102	7.00	.20	7.20	28.80
7	101	7.00	.20	7.20	28.80
8	100	7.00	.20	7.20	28.80
9	99	7.00	.20	7.20	28.80
10	98	7.00	.20	7.20	28.80
11	97	7.00	.20	7.20	28.80
12	96	7.00	.40	7.40	29.60
13	95	7.00	.40	7.40	29.60
14	94	7.00	.40	7.40	29.60
15	93	7.00	.40	7.40	29.60
16	92	7.00	.40	7.40	29.60
17	91	7.00	.40	7.40	29.60
18	90	7.00	.40	7.40	29.60
19	89	7.00	.40	7.40	29.60
20	88	7.00	.40	7.40	29.60
21	87	7.00	.40	7.40	29.60
22	86	7.00	.40	7.40	29.60
23	85	7.00	.40	7.40	29.60
24	84	7.00	.60	7.60	30.40
25	83	7.00	.60	7.60	30.40
26	82	7.00	.60	7.60	30.40
27	81	7.00	.60	7.60	30.40
28	80	7.00	.60	7.60	30.40
29	79	7.00	.60	7.60	30.40
30	78	7.00	.60	7.60	30.40
31	77	7.00	.60	7.60	30.40
32	76	7.00	.60	7.60	30.40
33	75	7.00	.60	7.60	30.40
34	74	7.00	.60	7.60	30.40
35	73	7.00	.60	7.60	30.40

R. A. Watson, Corporation Commissioner, et al. 329

Month loaned	Monthly payment	Principal	Interest	Installment	Four contracts matured, total
36	72	7.00	.80	7.80	31.20
37	71	7.00	.80	7.80	31.20
38	70	7.00	.80	7.80	31.20
39	69	7.00	.80	7.80	31.20
40	68	7.00	.80	7.80	31.20
41	67	7.00	.80	7.80	31.20
42	66	7.00	.80	7.80	31.20
43	65	7.00	.80	7.80	31.20
44	64	7.00	.80	7.80	31.20
45	63	7.00	.80	7.80	31.20
46	62	7.00	.80	7.80	31.20
47	61	7.00	.80	7.80	31.20
48	60	7.00	1.05	8.05	32.20
49	59	7.00	1.05	8.05	32.20
50	58	7.00	1.05	8.05	32.20
51	57	7.00	1.05	8.05	32.20
52	56	7.00	1.05	8.05	32.20
53	55	7.00	1.05	8.05	32.20
54	54	7.00	1.05	8.05	32.20
55	53	7.00	1.05	8.05	32.20
56	52	7.00	1.05	8.05	32.20
57	51	7.00	1.05	8.05	32.20
58	50	7.00	1.05	8.05	32.20
59	49	7.00	1.05	8.05	32.20
60	48	7.00	1.25	8.25	33.00
61	47	7.00	1.25	8.25	33.00
62	46	7.00	1.25	8.25	33.00
63	45	7.00	1.25	8.25	33.00
64	44	7.00	1.25	8.25	33.00
65	43	7.00	1.25	8.25	33.00

Month loaned	Monthly payment	Principal	Interest	Installment	Four contracts matured, total
66	42	7.00	1.25	8.25	33.00
67	41	7.00	1.25	8.25	33.00
68	40	7.00	1.25	8.25	33.00
69	39	7.00	1.25	8.25	33.00
70	38	7.00	1.25	8.25	33.00
71	37	7.00	1.25	8.25	33.00
72	36	7.00	1.45	8.45	33.80
73	35	7.00	1.45	8.45	33.80
74	34	7.00	1.45	8.45	33.80
75	33	7.00	1.45	8.45	33.80
76	32	7.00	1.45	8.45	33.80
77	31	7.00	1.45	8.45	33.80
78	30	7.00	1.45	8.45	33.80
79	29	7.00	1.45	8.54	33.80
80	28	7.00	1.45	8.45	33.80
81	27	7.00	1.45	8.45	33.80
82	26	7.00	1.45	8.45	33.80
83	25	7.00	1.45	8.45	33.80
84	24	7.00	1.65	8.65	34.60
85	23	7.00	1.65	8.65	34.60
86	22	7.00	1.65	8.65	34.60
87	21	7.00	1.65	8.65	34.60
88	20	7.00	1.65	8.65	34.60
89	19	7.00	1.65	8.65	34.60
90	18	7.00	1.65	8.65	34.60
91	17	7.00	1.65	8.65	34.60
92	16	7.00	1.65	8.65	34.60
93	15	7.00	1.65	8.65	34.60
94	14	7.00	1.65	8.65	34.60
95	13	7.00	1.65	8.65	34.60

Month loaned	Monthly payment	Principal	Interest	Installment	Four contracts matured, total
96	12	7.00	1.90	8.90	35.60
97	11	7.00	1.90	8.90	35.60
98	10	7.00	1.90	8.90	35.60
99	9	7.00	1.90	8.90	35.60
100	8	7.00	1.90	8.90	35.60
101	7	7.00	1.90	8.90	35.60
102	6	7.00	1.90	8.90	35.60
103	5	7.00	1.90	8.90	35.60
104	4	7.00	1.90	8.90	35.60
105	3	7.00	1.90	8.90	35.60
106	2	7.00	1.90	8.90	35.60
107	1	7.00	1.90	8.90	35.60
		\$750.00	111.40	861.40	3,445.60

DISTRICT OF OREGON,)

) ss.

County of Multnomah.)

Due service of the within affidavit is hereby accepted in Multnomah County, Oregon, this day of June, 1914, by receiving a copy thereof, duly certified to as such by O. A. Neal, Attorney for plaintiff.

Martin L. Pipes, J. M. Pipes,
Attorneys for Defendants.

Filed June 22, 1914. A. M. Cannon, Clerk.

And afterwards, to wit, on the 22nd day of June, 1914, there was duly filed in said Court and cause an affidavit of W. R. MACKENZIE in words and figures as follows, to wit:

AFFIDAVIT OF W. R. MACKENZIE.

United States of America,)
District of Oregon,) ss.
County of Multnomah.)

I, W. R. Mackenzie, being first duly sworn, on oath say; that I am a Certified Public Accountant and have been for many years, and that I am the senior member of the firm of W. R. Mackenzie & Son, of Portland, Oregon; that the contract of the plaintiff, The National Mercantile Company, Limited, was submitted to my firm for the purpose of ascertaining how it would work out. I further state that we have worked out a detail statement of 100 contracts of \$1000 each, in a series where the net monthly installments are maintained at \$760 by adding additional contracts to fill vacancies caused by contracts maturing. The statement is hereto attached marked Exhibit "A" and made part of this affidavit, and is based upon the companies contract, which provides that the initial and three subsequent payments are used as an Expense Fund. And have further allowed an expense fund of 20 per cent on all subsequent payments up to time of loan. And that the result is that the last contract of the first \$100,000 will mature in the 94th month from the first payment.

We have figured and are in a position to state absolutely that assuming that the company can keep its expenses within seven and one-half ($7\frac{1}{2}\%$) of all moneys paid in by contract holders prior to maturity of loan, that the Company will be in a position to absolutely to carry out all the terms of the contract on its part with-

out taking into consideration the profits or increase of the loan and reserve fund, which the company is entitled to receive, by reason of lapses, paid-up Certificates, surrender value, or use of surplus funds.

W. R. Mackenzie.

Subscribed and sworn to before me this 22nd day of June, 1914.

(Seal)

O. A. Neal,
Notary Public for Oregon.

COPY

PORTLAND, OREGON, June 20, 1914.

Mr. George E. Stillings, President,

The National Mercantile Company, Limited,

Vancouver, B. C.

Dear Sir:

In accordance with your request we have made a detailed examination of the terms and conditions embraced in the 3% loan and home purchasing contract of The National Mercantile Company, Limited, with a view to compiling a series of one hundred contracts and submit herewith the following described exhibit:

EXHIBIT "A"

STATEMENT SHOWING THE MONTHS ON WHICH CONTRACTS WOULD MATURE IN A SERIES OF ONE HUNDRED CONTRACTS, THE SERIES BEING MAINTAINED AT ONE HUNDRED CONTRACTS.

Yours truly,

(Signed)

W. R. Mackenzie & Son,
Certified Public Accountants.

THE NATIONAL MERCANTILE COMPANY,
LIMITED, VANCOUVER, B. C.

STATEMENT SHOWING THE MONTHS ON WHICH CONTRACTS WOULD MATURE IN A SERIES OF ONE HUNDRED CONTRACTS, THE SERIES BEING MAINTAINED AT ONE HUNDRED CONTRACTS.

Month	Amount of Loan	Amount of Loans to Date
6	\$1,000.00	\$1,000.00
7	1,000.00	2,000.00
8	1,000.00	3,000.00
9	1,000.00	4,000.00
11	1,000.00	5,000.00
12	1,000.00	6,000.00
13	1,000.00	7,000.00
14	1,000.00	8,000.00
15	1,000.00	9,000.00
17	1,000.00	10,000.00
18	1,000.00	11,000.00
19	1,000.00	12,000.00
20	1,000.00	13,000.00
21	1,000.00	14,000.00
22	1,000.00	15,000.00
24	1,000.00	16,000.00
25	1,000.00	17,000.00
26	1,000.00	18,000.00
27	1,000.00	19,000.00
28	1,000.00	20,000.00

THE NATIONAL MERCANTILE COMPANY,
LIMITED, VANCOUVER, B. C.

STATEMENT SHOWING THE MONTHS ON
WHICH CONTRACTS WOULD MATURE,
ETC.

Month	Amount of Loan	Amount of Loans to Date
29	1,000.00	21,000.00
30	1,000.00	22,000.00
31	1,000.00	23,000.00
32	1,000.00	24,000.00
33	1,000.00	25,000.00
34	1,000.00	26,000.00
35	1,000.00	27,000.00
36	\$1,000.00	\$28,000.00
37	1,000.00	29,000.00
38	1,000.00	30,000.00
39	1,000.00	31,000.00
40	1,000.00	32,000.00
41	1,000.00	33,000.00
42	1,000.00	34,000.00
43	1,000.00	35,000.00
44	1,000.00	36,000.00
45	1,000.00	37,000.00
46	1,000.00	38,000.00
47	1,000.00	39,000.00
48	1,000.00	40,000.00
49	1,000.00	41,000.00
50	1,000.00	42,000.00
51	2,000.00	44,000.00
52	1,000.00	45,000.00

**THE NATIONAL MERCANTILE COMPANY,
LIMITED, VANCOUVER, B. C.****STATEMENT SHOWING THE MONTHS ON
WHICH CONTRACTS WOULD MATURE,
ETC.**

Month	Amount of Loan	Amount of Loans to Date
53	1,000.00	46,000.00
54	1,000.00	47,000.00
55	1,000.00	48,000.00
56	1,000.00	49,000.00
57	1,000.00	50,000.00
58	2,000.00	52,000.00
59	1,000.00	53,000.00
60	1,000.00	54,000.00
61	1,000.00	55,000.00
62	1,000.00	56,000.00
63	\$2,000.00	\$58,000.00
64	1,000.00	59,000.00
65	1,000.00	60,000.00
66	1,000.00	61,000.00
67	2,000.00	63,000.00
68	1,000.00	64,000.00
69	1,000.00	65,000.00
70	1,000.00	66,000.00
71	2,000.00	68,000.00
72	1,000.00	69,000.00
73	1,000.00	70,000.00
74	2,000.00	72,000.00
75	1,000.00	73,000.00
76	1,000.00	74,000.00

THE NATIONAL MERCANTILE COMPANY,
LIMITED, VANCOUVER, B. C.

STATEMENT SHOWING THE MONTHS ON
WHICH CONTRACTS WOULD MATURE,
ETC.

Month	Amount of Loan	Amount of Loans to Date
77	2,000.00	76,000.00
78	1,000.00	77,000.00
79	2,000.00	79,000.00
80	1,000.00	80,000.00
81	1,000.00	81,000.00
82	2,000.00	83,000.00
83	1,000.00	84,000.00
84	2,000.00	86,000.00
85	1,000.00	87,000.00
86	2,000.00	89,000.00
87	1,000.00	90,000.00
88	2,000.00	92,000.00
89	1,000.00	93,000.00
90	\$2,000.00	\$95,000.00
91	1,000.00	96,000.00
92	2,000.00	98,000.00
93	1,000.00	99,000.00
94	2,000.00	101,000.00

DISTRICT OF OREGON,)
) ss.
County of Multnomah.)

Due service of the within affidavit is hereby accepted in Multnomah County, Oregon, this 22nd day

of June, 1914, by receiving a copy thereof, duly certified to as such by O. A. Neal, Attorney for Plaintiff.

Martin L. Pipes,

Attorney for Defendant Martin.

Filed June 22, 1914. A. M. Cannon, Clerk.

And afterwards, to wit, on the 16th day of July, 1914, there was duly filed in said court and cause an **AFFIDAVIT OF GEORGE E. STILLINGS**, in words and figures as follows, to wit:

AFFIDAVIT OF GEORGE E. STILLINGS.

Province of British Columbia,)

Dominion of Canada,)

to-wit:)

IN THE MATTER of the Corporation
Laws of the State of Oregon, and
Amendments, and,

IN THE MATTER of the Memorandum of Association and Articles of the
National Mercantile Company, Limited, and,

IN THE MATTER of a certificate required of the United States Consul at
Vancouver, British Columbia, as to
their genuine, valid and subsisting
character:

I, George Edward Stillings, of the City of Vancouver, in the Province of British Columbia, President and Manager of the above named Company, **DO SOL-**

EMNLY DECLARE: That I made application to Mr. Mansfield, the United States Consular Agent at Vancouver, British Columbia, for a Certificate that the copy of the Memorandum of Association and Articles of The National Mercantile Company, Limited, as altered, are of a genuine, valid and subsistent character.

2. That said copy produced by me to the said United States Consul were certified by the Registrar of Joint Stock Companies for British Columbia to be correct copies of the Memorandum of Association and Articles of the said Company as filed and registered in the office of the Registrar of Joint Stock Companies at Victoria, British Columbia.

3. The said Consul refused to sign the Certificate which I requested of him and as above mentioned, stating that he felt he could not properly do so. But he suggested that if a Certificate were obtained from the Provincial Secretary for the Province of British Columbia certifying to the effect that the Registrar of Joint Stock Companies was the proper officer having the custody of the original Memorandum of Association and Articles of the said Company, and that the said Registrar has the requisite official knowledge as to whether such memorandum of Association and Articles are of a genuine, valid and subsistent character, that he would give his certificate as required.

4. I had first applied to the Registrar of Joint Stock Companies to certify that the said Memorandum and Articles were of a genuine, valid and subsistent character, and the said Registrar refused to give such certificate, as appears by his letter dated the 25th day of

June, 1914, addressed to my said company, which said letter is now produced and shown to me and marked "Exhibit G. E. S. 4," to this, my Declaration.

5. I thereupon caused my Solicitors, Messrs. Burns & Walkem, to apply to the Provincial Secretary of the Province of British Columbia, to obtain a Certificate to the effect as suggested by the United States Consul aforesaid, and I am advised by my said Solicitors, as appears by their letter to the said Company dated the 8th day of July, A. D. 1914, that they made such application and that the said Provincial Secretary refuses to give such a Certificate, as appears by his letter of the 7th of July, A. D. 1914, addressed to my said Solicitors, Messrs. Burns and Walkem, for the reasons therein stated. The said letters are now produced and shown to me and marked Exhibits "G. E. S. 1" and "G. E. S. 2," respectively, to this, my Declaration.

6. I thereupon again interviewed the said United States Consul at Vancouver, British Columbia, advising him that the Provincial Secretary aforesaid refused to give the Certificate required of him, and I requested the said United States Consul to give the Certificate which I had before requested of him, certifying that the said Memorandum and Articles of the said Company were of a genuine, valid and subsistent character, and the said Consul absolutely refused to give such Certificate.

7. I thereupon wrote to my said Solicitors asking their opinion as to whether it would be advisable to apply to the Courts of British Columbia for a Mandamus or Order compelling the said Registrar of Joint Stock Companies and Provincial Secretary to give the Certifi-

cates required of them, and I am advised by my said solicitors, as appears by their letter to my said Company, dated the 9th day of July, 1914, that such an application would be useless, as the Mandamus would most probably not be granted. Said letter from my Solicitors is now produced and shown to me, and marked Exhibit "G. E. S. 3," to this, my Declaration.

8. For the reason stated, it is therefore impossible for The National Mercantile Company, Limited, to obtain a certificate from the United States Consul, certifying that the Memorandum of Association and Articles produced are of a genuine, valid and subsistent character, as required by the provisions of the Corporation Laws of the State of Oregon. And I make this solemn Declaration, conscientiously believing it to be true, and knowing it to be of the same force and effect as if made upon oath under the "Canada Evidence Act."

George Edward Stillings.

Declared before me at the City of Vancouver, in the Province of British Columbia, this 9th day of July, A. D. 1914.

W. S. Lane,

A Notary Public in and for the Province of British Columbia.

This is Exhibit "G. E. S. No. 1," referred to in the Declaration of George Edward Stillings, sworn before me herein this 9th day of July, A. D. 1914.

(Seal)

W. S. Lane,

A Notary Public for taking Affidavits within British
Columbia.

(Exhibit G. E. S. No. 1.)

Provincial Secretary, Province of British Columbia,
Victoria, July 7th, 1914.

Messrs. Burns & Walkem,
Barristers, etc.,
Winch Building,
Vancouver, B. C.

Gentlemen:—

Re the National Mercantile Co., Ltd.

I return herewith the certificate and attachment enclosed with your letter of the 26th ultimo, and regret that it is not possible for me to sign this certificate in its present form.

At Mr. Garrett's request, I have already certified that he is the properly appointed Registrar of Joint Stock Companies, and as such has custody of the documents filed under the Companies Act and is authorized to certify to the truth of copies of them; but, as we view it, it is a matter for the Courts to decide whether any document filed is of "a genuine, valid and subsisting character." So long as it prima facie complies with the Companies Act, it is accepted for filing, but the Registrar does not look upon it as his duty, under the present law, to examine into the validity of such document.

I have the honor to be, gentlemen,

Your obedient servant,

H. E. Young,
Provincial Secretary.

(Exhibit "G. E. S. No. 2.)

Winch Building, Vancouver, B. C.

July 8th, 1914.

National Mercantile Co., Ltd.,

Winch Building,

Vancouver, B. C.

Dear Sirs:—

Pursuant to your instructions we made application to the Provincial Secretary for British Columbia, to have him sign the certificate to satisfy the U. S. Consul at Vancouver, so that he would feel justified in signing his certificate, as required by the Oregon Companies Act. We are today in receipt of a letter dated the 7th inst. from the Provincial Secretary, from which you will see he refuses to sign the certificate which we asked of him. He also returned the certified copy of the Memorandum of Association and Articles as altered, of your Company. We herewith enclose the said Articles, certificate and the said letter from the Provincial Secretary, together with your copy of the Incorporation Laws of Oregon, which you left with us.

NRR/S

Yours truly,

Enclosures 4.

Burns & Walkem

per N. R. R.

This Exhibit is "G. E. S. No. 2" referred to in the Declaration of George Edward Stillings sworn before me herein this 9th day of July, A. D. 1914.

W. S. Lane,

A Notary Public for taking Affidavits within British Columbia.

(SEAL)

(Exhibit G. E. S. 3)

Winch Building, Vancouver, B. C.

July 9, 1914.

The National Mercantile Company, Limited,
Winch Building, City.

Dear Sirs:

Re Certificate of the National Mercantile Company,
Limited, Articles of Association.

We are in receipt of your letter of the 9th inst., inquiring as to whether by reason of the refusal of the Provincial Secretary and the Registrar of Joint Stock Companies to give the Certificates requested, it would be of any use to apply to the Courts of British Columbia for a mandamus to compel these officers to give such certificates.

We think the office of the Registrar of Joint Stock Companies might be considered in the light of a depository for these documents, and the Registrar of Joint Stock Companies the custodian thereof, and we do not think that the British Columbia Companies Act contemplated that the Registrar of Joint Stock Companies or the Provincial Secretary should give such Certificates as you are requiring, namely; that the Articles and memorandum deposited are of a genuine, valid and subsisting character.

We, therefore, are of the opinion that it would be useless to apply to the Courts of British Columbia for the mandamus which you suggest, as the Courts would most likely refuse the application.

Yours faithfully,

Burns & Walkem,

NRR/Flo.

Per N. R. R.

This is Exhibit "G. E. S. No. 3" referred to in the declaration of George E. Stillings sworn before me herein this 9th day of July, A. D. 1914.

W. S. Lane,

A Notary Public for taking Affidavits within British Columbia.

(SEAL)

Exhibit "G. E. S." No. 4.

Office of the Registrar of Joint Stock Companies.

The Government of the Province of British Columbia.

25th June, 1914.

The National Mercantile Company, Limited,

Winch Building,

Vancouver, B. C.

Dear Sirs:

I return certified copy of your Memorandum with additional certificate which you wish to be signed. I do not feel that I can sign any such certificate as there is no authority for it in the Companies Act. The Companies Act only provides that the Registrar may certify copies to be true copies. I can not certify that a document is either genuine, valid or subsisting. I also return your fee.

I am,

Your obedient servant,

H. G. Garrett,

REGISTRAR OF JOINT STOCK COMPANIES.

Enc.

This is Exhibit "G. E. S. No. 4" referred to in the

declaration of George Edward Stillings, sworn before
me herein this 9th day of July, A. D. 1914.

W. S. Lane,

(SEAL)

A Notary Public for taking Affidavits within British Columbia.

STATE OF OREGON,)
) ss.

County of Multnomah.)

Due service of the within affidavit and the receipt of a copy thereof duly prepared and certified by George Rossman one of the attorneys for plaintiff is hereby admitted at the City of Portland, in said County and State, this 16th day of July, 1914.

Martin L. Pipes,

Attorney for Defendants.

Filed July 16, 1914. A. M. Cannon, Clerk.

And afterwards, to-wit, on the 27th day of July, 1914, there was duly filed in said Court, and cause an **OPINION**, in words and figures as follows, to-wit:

OPINION.

Before Gilbert, Circuit Judge, and Wolverton and Bean, District Judges.

Wilson, Neal & Rossman for the Plaintiff.

Martin L. Pipes, John M. Pipes and George A. Pipes
for Defendant R. A. Watson.

A. M. Crawford, Attorney General.

Walter H. Evans, District Attorney for Multnomah
County.

Arthur A. Murphy, Deputy District Attorney for Multnomah County for the Defendants A. M. Crawford et al.

Wolverton, District Judge :

The chief purpose of this suit is to have declared void and inoperative an act of the Legislative Assembly of the State of Oregon entitled "An Act to protect purchasers of stocks and bonds and prevent fraud in the sale thereof; to create a corporation department," etc., approved February 28, 1913, and commonly known as the "Blue Sky Law."

The complainant is a British Columbia corporation, with its principal place of business at Vancouver, and claims to be doing a loaning business upon real estate mortgage security. It has a general agent, A. D. Baker, residing in Portland, Oregon. Applications for loans are made to him, and he forwards them to the company for approval. When approved, the company issues to Baker an undertaking, under seal, agreeing, in consideration of the payment of one-one hundredth ($1/100$) of the loan each month, to pay to said Baker the amount of the desired loan, as soon as the loan fund of the company contains a sufficient amount of money to make up the said loan. The undertaking being assignable, Baker at once assigns the same to the prospective borrower, who thereupon makes his payments to Baker, or to the company, at his option. The loans so made or agreed to be made are secured by mortgages upon real property in Oregon. Baker attends to securing the mortgages, and, when executed, forwards them to the company, and also

collects and forwards to the company the monthly installments as they become due and payable.

The question is presented primarily whether, under this state of facts, the complainant is doing business within the State of Oregon.

The answer is obvious. Practically the entire business of the company relating to loans within the State is transacted by Baker, the general agent, residing at Portland. He solicits the loans, takes applications, collects the first payment, together with all installments, attends to taking the mortgages, and forwards all to the company at its home office. From the home office is issued the obligation, to Baker, which he assigns to the borrower at Portland. The business does not consist of the securing of one loan only, or for a limited number, but of continuous and numerous transactions of the kind, with numerous persons, and cannot be other than a carrying on of the business, and that within the State.

Being engaged in business within the State, the defendants, by plea in abatement, challenge complainant's right properly so to continue in business, or to maintain this suit, on the ground that a copy of its charter or articles of incorporation has not been properly certified. The objection consists in the fact that the certificate of the Consul General of the United States residing at Vancouver, B. C., fails to state that the certifying officer, that is, the legal keeper of the original charter or articles of incorporation, has the requisite knowledge as to whether such charter or articles of incorporation is of a genuine, valid and subsisting character.

The statute of Oregon, Sec. 6727 Lord's Oregon

Laws, requires that every foreign corporation shall, before transacting business in the State, file with the Secretary of State a written declaration of its desire and purpose to engage in business within the State, which declaration shall, among other things, be accompanied by a certified copy of the charter or articles of incorporation of the company, certified to by the legal keeper of the original, together with a certificate of the United States Ambassador, Minister, Consul General, Vice-consul, or Charge d'Affaires in such foreign country, "that such certifying officer has the requisite official knowledge as to whether such charter or articles of incorporation are of a genuine, valid and subsisting character, and that such copy is duly certified by the officer having the legal custody of the original."

The company has the certificate of the Registrar of Joint Stock Companies to the effect that the annexed copy of the articles of association is a true and correct copy of the original filed in the Registrar's office; also the certificate of the Provincial Secretary of British Columbia to the effect that the Registrar is the duly appointed officer, and that the signature and seal attached to his certificate are his signature and seal, and that said Registrar has the legal custody of the original document; and also a certificate of the Consul General of the United States residing at Vancouver, B. C., to the effect that the Registrar is the duly appointed and commissioned Registrar of Joint Stock companies for the province of British Columbia, and that to all his official acts full faith and credit are due and given. This officer does not, however, certify, as required by the statute of Oregon,

that the Registrar has requisite official knowledge "as to whether such charter or articles of incorporation are of a genuine, valid and subsisting character."

This leaves the credentials for obtaining a certificate or license for engaging in business in this State, as we think, fatally defective, and for that reason the complainant can have no proper or legal standing for doing or transacting business within the State. Not being authorized to do business within the State, it follows irresistibly that it has no legal standing for maintaining a suit here, and it has been so held in this jurisdiction. *Cyclone Mining Co. v. Baker Light & Power Co.*, 165 Fed. 996; *La Moine Lumber & Trading Co. v. Kesterson*, 171 Fed. 980.

It is further maintained, under the plea in abatement, that the complainant has failed to pay or offer to pay the annual license fee of \$100, as required by an act of the Legislative Assembly of the State, approved March 4, 1913, Session Laws 1913, p. 772. This statute requires that every foreign corporation shall, between July 1st and August 15th of each year, pay in advance to the corporation department an annual license fee of \$100. And this objection is also perhaps well assigned.

Again, it is urged that the complainant is engaged in a lottery business. While we are not assured that the business carried on can be so characterized, yet, from a cursory examination of the scheme under which the company makes its supposed loans and prosecutes its project, we are not at all persuaded that it is not engaged in a fraudulent business.

But, for the fatality in the Consul General's certi-

ificate, as heretofore indicated, the suit ought to abate, and such will be the order of the court.

Filed July 27, 1914. A. M. Cannon, Clerk.

And afterwards, to-wit, on Monday, the 10th day of August, 1914, the same being the 31st Judicial day of the regular July, 1914, term of said Court; Present: the Honorable Charles E. Wolverton, United States District Judge presiding, the following proceedings were had in said cause, to-wit:

FINAL DECREE.

This cause was heard by the Hon. William B. Gilbert, United States Circuit Judge, and the Hon. Chas. E. Wolverton and Hon. Robt. S. Bean, United States District Judges, upon the pleas in abatement set out in the answers of all of the defendants, and was argued by O. A. Neal and George Rossman of counsel for the plaintiff, and by Martin L. Pipes and George A. Pipes, of counsel for defendant R. A. Watson; in consideration whereof it is

ORDERED and **ADJUDGED** that the said pleas in abatement be and the same are hereby sustained, and that the bill of plaintiff herein be, and the same is hereby, adjudged to be abated. And it is

FURTHER ORDERED that these defendants do have and recover of and from said plaintiff their costs and disbursements taxed at

Charles E. Wolverton,
Judge of the above entitled Court.

Filed August 10, 1914. G. H. Marsh, Clerk.

And afterwards, to-wit, on the 8th day of September, 1914, there was duly filed in said Court, and cause a PETITION FOR APPEAL, in words and figures as follows, to-wit:

PETITION FOR APPEAL.

To the Honorable William B. Gilbert, Circuit Judge and the Honorable Charles E. Wolverton and Robert S. Bean, District Judges, the above named The National Mercantile Company, Limited, a corporation, the plaintiff above named, feeling aggrieved by the decree rendered and entered in the above entitled cause on the 10th day of August, A. D. 1914, does hereby appeal from said decree to the Circuit Court of Appeals for the ninth circuit, for the reasons set forth in the assignment of errors filed herewith, and it prays that its appeal be allowed and that citation be issued as provided by law, and that a transcript of the record proceedings and documents upon which said decree was based, duly authenticated be sent to the United States Circuit Court of Appeals for the Ninth Circuit, under the rules of such court in such cases made and provided.

And your petitioner further prays that the proper order relating to the required security to be required of it be made.

Wilson, Neal & Rossman,
Solicitors for Plaintiff.

Appeal allowed upon giving bond as required by law for the sum of Five Hundred (\$500.00) Dollars.

R. S. Bean,
Judge of the above entitled Court.

[illegible]

Due service of the within petition for appeal is hereby accepted in Multnomah County, Oregon, this 8th day of September, 1914, by receiving a copy thereof, duly certified to as such by O. A. Neal one of the attorneys for plaintiff.

Martin L. Pipes,
Attorney for Defendant R. A. Watson.

Walter H. Evans,
Attorney for all the Defendants except R. A.
Watson, Corporation Commissioner.

Filed September 8, 1914. G. H. Marsh, Clerk.

And afterwards, to-wit, on the 8th day of September, 1914, there was duly filed in said Court and cause an **ASSIGNMENT OF ERRORS**, in words and figures as follows, to-wit:

ASSIGNMENT OF ERRORS.

Now comes the plaintiff in the above entitled cause and files the following assignment of errors upon which it will rely upon its prosecution of the appeal in the above entitled cause, from the decree made by this Honorable Court on the 10th day of August, 1914.

First: That the said District Court of the United States for the District of Oregon, Honorable William B. Gilbert, Circuit Judge and Honorable Charles E. Wolverton and Robert S. Bean, District Judges, sitting,

erred in sustaining the Pleas in Abatement filed herein by the defendants, and in entering an order that plaintiff's Bill of Complaint be abated.

Second: That the said District Court erred in holding that the plaintiff could not maintain its suit without having first complied with the laws of the State of Oregon, regulating the carrying on of business within said state by foreign corporations, as set forth in sections 6707, 6726 and 6727 of Lord's Oregon Laws, and with the act of the Legislature of the State of Oregon for 1913, regulating the payment of an annual license fee, General Laws of Oregon, 1913, page 772.

Third: That the said district court erred in refusing to hold that the attempt made by the plaintiff to comply with the laws of the State of Oregon, regulating the carrying on of business in said state by foreign corporations, as fully set forth in the plaintiff's supplemental complaint and in the affidavit of George E. Stillings dated July 9th, 1914, was a sufficient compliance with the laws of the State of Oregon, regulating the carrying on of business in said State by foreign corporations, as required by Sections 6707, 6726 and 6727 of Lord's Oregon Laws, and by an act of the legislature of the State of Oregon for 1913, General Laws of Oregon, 1913, page 772, to entitle said plaintiff to maintain this suit.

Fourth: That the said district court erred in failing and refusing to hold that the plaintiff was engaged in handling, selling and disposing of an article of commerce, within the meaning of the interstate commerce clause of the federal constitution.

Fifth: That the said District Court erred in failing and refusing to hold, that the business being carried on by the plaintiff through its soliciting agents in the State of Oregon, and its method of doing business in said state, as set forth in its Bill of Complaint and affidavits filed in said cause, constituted and was interstate commerce within the meaning of Section 8 of Article 1 of the Constitution of the United States, regulating interstate commerce.

Sixth: That the said District Court erred in refusing to grant the relief prayed for in the plaintiff's bill of complaint.

Seventh: That the said District Court erred in refusing to determine said cause upon its merits.

Eighth: That the said District Court erred in failing and refusing to pass upon the question of the constitutionality of Chapter 341 of the General Laws of Oregon for 1913, generally known as the "Blue Sky Law."

Ninth: That the said District Court erred in failing and refusing to hold and decide that Chapter 341 of the General Laws of Oregon for 1913, known as the Blue Sky Laws, was in violation of Sec. 20 of Art. 4 of the Constitution of the State of Oregon, which provides:

"Every Act shall embrace but one subject and matters properly connected therewith, which subject shall be expressed in the title; but if any subject shall be embraced in an Act which shall not be expressed in the title such shall be void only as to so much thereof as shall not be expressed in the title."

For the reason that said act embraces more than one subject, in that it proposes to

(a) Regulate and supervise stock brokers and the business conducted by them;

(b) Regulate and supervise investment companies;

(c) Regulate and supervise the agents of the brokers and their business; the kind and nature of securities in which purchasers may invest, and purports to protect purchasers of stocks and bonds;

(d) It purports to define fraud in the sale of stocks and bonds;

(e) It purports to create a Corporation Department.

And the title of the said act does not express the full subject thereof, in as much as the substance of the Act purports to define stock brokers and regulate their business, and the title of the act does not mention stock brokers or their business, and does not express the regulation and supervision of the purchase and sale by individuals, corporations, or partnerships of securities of any kind or character.

Tenth: That the said District Court erred in failing and refusing to hold and decide that Chapter 341 of the General Laws of Oregon for 1913, known as the "Blue Sky Law" was unconstitutional and void as being in violation of the Fourteenth Amendment to the Federal Constitution, for the reasons set forth in plaintiff's Bill of Complaint.

Eleventh: That the said District Court erred in

failing and refusing to hold that said Chapter 341 of the General Laws of Oregon for 1913, known as the "Blue Sky Law" was unconstitutional and void because in violation of Section 8 or Article 1 of the Constitution of the United States, for the reasons set forth in plaintiff's bill of complaint.

Twelfth: That the said District Court erred in not finding and decreeing that said Chapter 341 of the General Laws of the State of Oregon for 1913, known as the "Blue Sky Law" was unconstitutional and void because in violation of Section 10 of Article 1 of the Constitution of the State of Oregon and of the Fourteenth Amendment to the Federal Constitution, for the reason that it deprives the plaintiff and others similarly situated, of the property without due process of law, as set forth in plaintiff's bill of complaint.

Thirteenth: That the said District Court erred in failing to find and decree that said Chapter 341 of the General Laws of Oregon for 1913, known as the "Blue Sky Law" was unconstitutional and void as being in violation of Section 20, Article 1 of the Constitution of the State of Oregon, and of the Fourteenth Amendment to the Constitution of the United States, because said act undertakes to regulate and restrict the rights of corporations, co-partnerships, associations, and firms, who by said act are defined as stock brokers, and the plaintiff and its representatives in Oregon, and all such stock brokers, and provides that said brokers shall not sell, nor offer for sale any securities, nor profess the business of selling or offer for sale any securities covered by said act, unless such stock broker shall have otherwise com-

plied with the requirements of said act; that, insofar as the said Act attempts to classify and define said stock brokers in said securities, it is unconstitutional and void, because it denies to said broker, as therein defined, the equal protection of the law, and in defining and classing those who sell or offer for sale any of the stocks, bonds or other securities issued by investment companies, as defined by said act, said classification is unreasonable, invalid and void.

And further because said act purports to prohibit plaintiff and others similarly situated from selling or offering for sale any stocks, bonds or other securities covered by said Act, unless plaintiff shall furnish the said corporation commissioner with a statement as to their names, addresses, the general character of the securities to be dealt in, the place of their office in Oregon, and shall furnish evidence establishing the sound, moral character and good business repute of the person so applying, and for what length of time and in what capacity he has been engaged in the sale of securities, also a statement of the assets and liabilities of all persons interested as principals, officers, directors and managing or sales agents of such stock broker and such additional information as the Commissioner may deem necessary.

Fourteenth: That the said District Court erred in failing to find and decree that said Chapter 341 of the General Laws of Oregon for 1913, known as the "Blue Sky Law" was unconstitutional and void, as being in violation Section 1 of Article 3 of the Constitution of the State of Oregon, because said act undertakes to

delegate legislative authority to the Corporation Commissioner attempted to be created under said act.

Fifteenth: That said District Court erred in failing to find and decree that said Chapter 341 of the General Laws of Oregon for 1913, known as the "Blue Sky Law" was unconstitutional and void, as being in violation of the Fourteenth Amendment to the Constitution of the United States, and in violation of Section 18, Article 1 of the Constitution of the State of Oregon, in that said act denies to plaintiff, the right to a judicial investigation, by due process of law, as to whether the articles of incorporation, constitution and by-laws of plaintiff, and others similarly situated, proposed plan of business, proposed contracts contain and provide for a safe, fair, just and equitable plan for the transaction of business, and as to whether such articles of incorporation or association, charter, constitution and by-laws, plan of business or proposed contract contain any provision that is unsafe, unfair, unjust, inequitable or oppressive to any class of contributors or customers, and as to whether such investment company is solvent and intends to do a fair and honest business.

Sixteenth: That said District Court erred in failing to find and decree that said Chapter 341 of the General Laws of Oregon for 1913, known as the "Blue Sky Law," was unconstitutional and void, in that said act subjects plaintiff, and others similarly situated, to cruel, unusual and vindictive punishment, in violation of Section 15 of Article 1 of the Constitution of the State of Oregon, by reason of the fact that it prescribes a penalty for the sale or offer for sale of any stocks, bonds or

other securities of investment companies unless said companies shall comply with the restrictions mentioned in said act, of a fine of ten thousand dollars or imprisonment in the state prison for not more than ten years, or both, in case of conviction.

Seventeenth: That the said District Court erred in not finding and decreeing for plaintiff on the record.

Eighteenth: That the decree of said District Court is against the law and equity of said cause.

Nineteenth: That said District Court erred in failing to find and enter a decree allowing plaintiff's motion for an injunction.

WHEREFORE, the appellant prays that said decree be reversed and that said District Court for the District of Oregon be ordered to enter a decree reversing the decision of the lower court in said cause.

Wilson, Neal & Rossman,

Solicitors for Plaintiff and Appellant.

DISTRICT OF OREGON,)

) ss.

County of)

Due service of the within Assignment of Errors is hereby accepted in Multnomah County, Oregon, this 8th day of September, 1914, by receiving a copy thereof, duly certified to as such by O. A. Neal, one of the attorneys for plaintiff.

Martin L. Pipes,

Attorney for R. A. Watson, Defendant.

Walter H. Evans,

Attorney for all the Defendants except R. A.

Watson, Corporation Commissioner.

Filed September 8, 1914. G. H. Marsh, Clerk.

And afterwards, to-wit, on the 10th day of September, 1914, there was duly filed in said Court, and cause, a **BOND ON APPEAL**, in words and figures as follows, to-wit:

BOND ON APPEAL.

KNOW ALL MEN BY THESE PRESENTS, that The National Mercantile Company, Limited, a corporation, as principal, and The National Surety Company, a corporation organized and existing under the laws of the State of New York, and authorized to transact a surety business in the State of Oregon, are held and firmly bound unto R. A. Watson, Corporation Commissioner; A. M. Crawford, Attorney General; Walter H. Evans, Dist. Atty. in Multnomah County; John Irwin, Dist. Atty. in Jackson County; George M. Brown, Dist. Atty. in Douglas County; Joseph M. Devers, Dist. Atty. in Lane County; Arthur Clarke, Dist. Atty. in Benton County; Lawrence A. Liljequist, Dist. Atty. in Coos County; Gale S. Hill, Dist. Atty. in Linn County; Ernest R. Ringo, Dist. Atty. in Marion County; Gilbert L. Hedges, Dist. Atty. in Clackamas County; D. H. Upjohn, Dist. Atty. in Polk County; E. B. Tongue, Dist. Atty. in Washington County; C. W. Mullens, Dist. Atty. in Clatsop County; W. B. Dillard, Dist. Atty. in Columbia County; W. A. Bell, Dist. Atty. in Wasco County; Frederick H. Steiwer, Dist. Atty. in Umatilla County; and S. T. Godwin,

Dist. Atty. in Baker County, defendants and appellees in the sum of Five Hundred Dollars (\$500.00), lawful money of the United States, to be paid to them and their respective executors, administrators and successors, to which payment well and truly to be made we bind ourselves and each of us jointly and severally, and each of our successors and assigns by these presents.

Sealed with our seals, and dated this 8th day of September, 1914.

WHEREAS, the above named plaintiff, The National Mercantile Company, Limited, has prosecuted an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, to reverse the decree of the District Court of the United States for the District of Oregon, in the above entitled cause.

NOW, THEREFORE, the condition of this obligation is such that if the above named plaintiff, The National Mercantile Company, Limited, shall prosecute its said appeal to effect, and answer all costs, if it fail to make good its appeal, then this obligation shall be void, otherwise to remain in full force and effect.

THE NATIONAL MERCANTILE COMPANY,
LIMITED,

By G. E. Stillings
President.

Witnesses as to
National Mercantile
Co., Ltd.

(Corporate Seal)

George L. Ryan
D. Coupland.

THE NATIONAL MERCANTILE COMPANY,
LIMITED,

By C. P. Nellist,
Secretary.

(Seal)

NATIONAL SURETY COMPANY,

By Max Hubbert, Resident Vice President.

M. R. Mann,

Witnesses as to Res. Asst. Secy.
National Surety Co.

Cora Osmund

O. A. Neal.

The within bond is approved both as to sufficiency
and form, this 10th day of September, 1914.

R. S. Bean,

Judge of the above entitled Court.

STATE OF OREGON,)

) ss.

County of Multnomah.)

Due service of the within Bond on Appeal and the
receipt of a copy thereof duly prepared and certified by
O. A. Neal one of the attorneys for plaintiff and appellee
is hereby admitted at the City of Portland, in said Coun-
ty and State, this 8th day of September, 1914.

M. L. Pipes,

Attorney for R. A. Watson, Defendant.

Walter H. Evans,

Attorney for all Defendants above named except

R. A. Watson.

Filed September 10, 1914. G. H. Marsh, Clerk.

And afterwards, to-wit, on the 10th day of September, 1914, there was duly filed in said Court, and cause, a PRAECIPE FOR TRANSCRIPT, in words and figures as follows, to-wit:

PRAECIPE FOR TRANSCRIPT.

*In the District Court of the United States, for the
District of Oregon.*

THE NATIONAL MERCANTILE COMPANY, LIMITED, a corporation,

Defendant,

vs.

R. A. WATSON, Corporation Commissioner;
A. M. CRAWFORD, Attorney General;
WALTER H. EVANS, District Attorney
in Multnomah County; John Irwin, Dist. At-
torney in Klamath County; E. E. Kelly, Dist.
Atty. in Jackson County; GEORGE M.
BROWN, Dist. Atty. in Douglas County;
JOSEPH M. DEVERS, Dist. Atty. in
Lane County; ARTHUR CLARKE, Dist.
Atty. in Benton County; LAWRENCE A.
LILJEQUIST, Dist. Atty. in Coos Coun-
ty; GALE S. HILL, Dist. Atty. in Linn
County; ERNEST R. RINGO, Dist. Atty.
in Marion County; GILBERT L.
HEDGES, Dist. Atty. in Clackamas Coun-
ty; D. H. UPJOHN, Dist. Atty. in Polk
County; E. B. TONGUE, Dist. Atty. in

Washington County; C. W. MULLENS,
Dist. Atty. in Clatsop County; W. B. DILL-
LARD, Dist. Atty. in Columbia County; W.
A. BELL, Dist. Atty. in Wasco County;
FREDRICK H. STEIWER, Dist. Atty.
in Umatilla County; S. T. GODWIN, Dist.
Atty. in Baker County,

Defendants.

Praeceptum for Transcript

TO G. H. MARSH, Clerk of the District Court of
the United States, for the District of Oregon:

Please prepare and certify transcript of the record
in the above entitled cause upon the appeal of the above
named The National Mercantile Company, Limited, a
corporation, to be filed in the office of the Clerk of the
United States Circuit Court of Appeals for the Ninth
Circuit, and include in said transcript the following
papers, pleadings and proceedings from the record in
said cause, to-wit:

Original Bill of Complaint, Filed April 20th, 1914.

Subpoena with order authorizing service to be made
by A. D. Baker, and affidavit of A. D. Baker, showing
service. Order to show cause why defendants should not
be restrained; motion for temporary restraining order,
and affidavits of A. D. Baker, dated April 20, 1914;
affidavit of George E. Stillings, dated April 20, 1914;
affidavit of W. B. Boyer, dated April 22, 1914; affidavit
of E. M. Borns, dated April 21, 1914; and joint affi-
davit of George E. Stillings and A. D. Baker, dated

April 22, 1914; affidavit of Amandus Butcher, dated April 21, 1914; affidavit of George E. Stillings, dated April 22, 1914, and all filed on April 22, 1914.

Answer and Plea in Abatement of R. A. Watson, filed June 22, 1914.

Answer and Plea in Abatement of all other defendants, filed June 15, 1914.

Supplemental Complaint, with exhibits, filed June 21st, 1914.

Affidavits of

Wiliam Thomas Stein, dated April 23, 1914;

Richard F. Winch, dated April 24, 1914.

Walter A. Sheppard, dated April 24, 1914;

William Osborne Webster, dated April 24, 1914;

Harry Cowan, dated April 25, 1914;

J. G. Todhunter, dated April 24, 1914;

Knox Walkem, dated April 23, 1914;

A. Dowd, dated April 27, 1914, with exhibits;

All filed April 28, 1914.

Affidavit of R. A. Watson, dated April 27th, 1914; with exhibits, except decisions referred to therein. Filed April 28th, 1914.

Affidavits of George E. Stillings, dated June 15th, 1914, and June 22, 1914, both filed June 22, 1914.

Affidavit of Wm. T. Stein, dated June 4th and 22, 1914, with exhibits. Filed June 22, 1914.

Affidavit of W. R. Mackenzie, dated June 22, 1914, with exhibits. Filed June 22, 1914.

Affidavit of George E. Stillings, dated July 9, 1914, with exhibits. Filed July 16th, 1914.

Opinion, filed July 27, 1914.

Decree, filed and entered August 10th, 1914.

Petition for Appeal Order allowing Appeal, Assignments of Errors, Citation on Appeal, Bond on Appeal.

This Praeceptum for Transcript.

Said Transcript to be prepared as required by law and the Rules of the United States Circuit Court of Appeals for the Ninth Circuit.

Wilson, Neal & Rossman,
Solicitors for Plaintiff.

DISTRICT OF OREGON,)
) ss.

County of Multnomah.)

Due service of the within praecipe for transcript is hereby accepted in Multnomah County, Oregon, this 10th day of September, 1914, by receiving a copy thereof, duly certified to as such by O. A. Neal, one of the attorneys for plaintiff.

Martin L. Pipes,
Attorney for Defendant R. A. Watson.

Walter H. Evans,
Attorney for all the Defendants except R. A.
Watson, Corporation Commissioner.

Filed September 10, 1914. G. H. Marsh, Clerk.

UNITED STATES OF AMERICA,)
) ss.

DISTRICT OF OREGON.)

I, G. H. Marsh, Clerk of the District Court of the

United States for the District of Oregon, do hereby certify that I have prepared the foregoing transcript of record on appeal in the case of National Mercantile Company, Limited, a corporation, plaintiff and appellant, against R. A. Watson, Corporation Commissioner and others, defendants, in accordance with the law and the rules of this Court, and in accordance with the praecipe of the appellant filed in said cause, and that the said transcript of record is a full, true and correct transcript of the record and proceedings had in said Court, in accordance with said praecipe, as the same appears of record and on file at my office and in my custody.

And I further certify that the cost of the foregoing record is \$..... for preparing transcript and \$..... for printing and that the same has been paid by the plaintiff in error.

In testimony whereof I hereunto set my hand and affix the seal of said Court, at Portland, in said District, on theday of..... 1914.

.....
Clerk.

